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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77- 77-452

MOBIL ALASKA PIPELINE COMPANY, *Petitioner,*

- against -

UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 29, 1977.

OPINIONS BELOW

The opinion of a divided panel of the United States Court of Appeals for the Fifth Circuit, Nos. 77-2392, 77-2412, 77-2421, 77-2437 (July 29, 1977), not yet reported, is set forth in the appendix. App. A. Also set forth in the appendix is an order of the Interstate Commerce Commission, Investigation and Suspension Docket No. 9164 (June 28, 1977). App. C.

JURISDICTION

The judgment of the Court of Appeals, dismissing a petition for review of an order of the Interstate Commerce Commission, was entered on July 29, 1977. App. B. A petition for rehearing, timely filed by another party in that proceeding, was denied on September 8, 1977. App. E. This petition for a writ of certiorari was filed within 90 days of the date of entry of judgment. The Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2350(a).

QUESTIONS PRESENTED

This case raises the question whether the investors who constructed the Trans-Alaska Pipeline, or any other investors who carry out a similar project, duly authorized by Congress, are entitled to have the fairness of the rates which they have adopted for interstate transportation on their pipeline determined by the Interstate Commerce Commission after full hearing, on the record, with an opportunity for judicial review; or whether, by coercive use of its statutory power to suspend tariff rates for seven months, the Commission may bypass the procedural safeguards described above, summarily condemn the rates adopted by the carriers, and dictate lesser rates to be charged on such a pipeline during its first seven months of operation, without opportunity for judicial review of the adequacy of such interim rates.

If the Commission may fix "interim rates" in the manner described, as it has done in this case, then it has an effective discretionary power to impose irreparable loss on pipeline carriers without opportunity for judicial review. If the Commission's rates are ultimately found to be too low, shippers benefiting from those rates cannot be required to pay the balance of the fair cost of transportation. And this Court has indicated that, under the regulatory scheme adopted by Congress, losses incurred during the period of a lawful suspension cannot be passed along to subsequent users of a regulated service.[1] Thus, the questions presented concern the fundamental protections which are available when private investment is devoted to public transportation and other regulated services.

1. Is the Interstate Commerce Commission authorized to suspend the operation of the original tariff schedules of a pipeline, where the effect of such suspension is to leave the pipeline without any schedules and to forbid it to operate while the suspension continues?
2. Is suspension of a pipeline's original tariff, which will result in irretrievable revenue loss to the pipeline, permissible under the Interstate Commerce Act and the Constitution where such suspension is not necessary to avoid potential loss to shippers, consumers or to persons who have protested the pipeline's tariff?
3. If the Interstate Commerce Commission does possess the power to suspend such original schedules, may it exercise such power in order to compel the carrier to provide service during the suspension period at lesser rates summarily fixed by the Commission?
4. If the Interstate Commerce Commission may suspend such original schedules and if it may do so in order to compel adoption of interim rates fixed by itself, may it fix such interim rates without a "full hearing" as required by 49 U.S.C. § 15(1) and without creation of a record

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[1] *See Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 152 (1962).

which would permit judicial review of their adequacy under the standards of the Interstate Commerce Act and the Constitution?

5. Does the Interstate Commerce Commission have, as a valid corollary of its power to suspend rates, the power to impose special refund and accounting obligations with respect to collections made pursuant to original or to "interim" tariffs?

STATUTORY PROVISIONS INVOLVED

This case concerns Part I of the Interstate Commerce Act, 49 U.S.C. §§ 1-27 (1976), as amended, notably by the Hepburn Act of 1906, ch. 3591, 34 Stat. 584, and the Mann-Elkins Act of 1910, ch. 309, 36 Stat. 539. The relevant provisions thereof, found in Sections 1(1), 1(3), 1(5), 6(1), 6(3), 6(7), 8, 15(1) and 15(7), are set forth in the Statutory Appendix, *infra,* together with relevant provisions of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-1655 (1976).

STATEMENT OF THE CASE

This case raises the question whether the Interstate Commerce Commission ("Commission") can use its power to suspend tariffs containing "new" rates (49 U.S.C. § 15(7)) in order to compel operation of the Trans-Alaska Pipeline System ("TAPS") during the statutory seven-month suspension period at interim rates dictated by the Commission. Petitioner Mobil Alaska Pipeline Company is one of eight companies which recently completed construction of TAPS at a cost of over $9 billion. *See* App. C-19. The pipeline's purpose is to transport crude oil from Alaska's North Slope southward some eight hundred miles across

arctic terrain to the TAPS marine terminal at Valdez, Alaska. From Valdez the oil is shipped to refineries in California, Washington and elsewhere in the lower 48 states. TAPS was specially authorized by Congress in the Trans-Alaska Pipeline Authorization Act, in which Congress declared that "[t]he earliest possible construction of a trans-Alaska oil pipeline . . . will best serve the national interest." 43 U.S.C. § 1651(c) (1976).

Under the form of ownership which the TAPS owners have adopted, each has an undivided interest in the pipeline and each separately undertakes to use its share of pipeline capacity to transport crude oil.[2] Although affiliates of all but one TAPS carrier are engaged in the production of oil on the North Slope, the percentage ownership of the pipeline varies from the affiliates' percentage ownership of oil production.[3] Each carrier recognizes its obligation to transport not only oil tendered by its affiliate but all oil that may be offered for shipment, without discrimination, and at a fair and reasonable cost consistent with the carriers' statutory right to a fair return on investment. 49 U.S.C. §§ 1(5), 15a.

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[2] The eight carriers share ownership in TAPS as follows:

Mobil Alaska Pipeline Co.	5%
Sohio Pipe Line Co.	33.34%
Arco Pipe Line Co.	21%
Exxon Pipeline Co.	20%
BP Pipelines Inc.	15.84%
Phillips Alaska Pipeline Corp.	1.66%
Union Alaska Pipeline Co.	1.66%
Amerada Hess Pipeline Corp.	1.50%

[3] For example, petitioner's parent, Mobil Oil Corp., owns only 2% of the oil being produced on the North Slope, while petitioner owns 5% of TAPS. Even if petitioner is tendered all its parent's oil for transportation, this would supply only 40% of its TAPS capacity. Union Alaska Pipeline Co.'s affiliates own no Alaskan oil.

Accordingly, as TAPS construction neared completion each carrier independently calculated and adopted a schedule of rates. On June 10, 1977, Mobil Alaska filed its tariff with the Interstate Commerce Commission pursuant to section 6(1) of the Interstate Commerce Act and 49 C.F.R. § 1300.57 (1976), to become effective on June 20, later postponed to June 30, 1977.

PROCEEDINGS BEFORE THE COMMISSION

On June 13, 1977, the Commission issued notice of a summary proceeding, pursuant to 49 U.S.C. § 15(7), to consider suspension of the tariffs of Mobil Alaska and the six other TAPS owners who had filed their tariffs.[4] The notice indicated that, contrary to the normal procedure established by Commission rule, this suspension proceeding would bypass the Commission's staff suspension board and its appellate division of three Commissioners and would instead be presented directly to the entire Commission. App. G-1.

On June 15 four parties—the State of Alaska, the Arctic Slope Regional Corporation ("ASRC"), the Department of Justice by its Antitrust Division, and the Bureau of Investigations and Enforcement of the Interstate Commerce Commission—filed protests challenging all TAPS tariffs as too high.

Because of its financial interest in Arctic Slope oil, Alaska sought to minimize the cost of transporting that oil to Valdez.[5] ASRC, representing Alaskan native

[4] Phillips Alaska Pipeline Corp. filed its original rates after the summary proceeding here at issue was commenced.

[5] Alaska sold the Arctic Slope oil leases to the producing companies for $900 million in 1969, and retained a royalty right to 12½% of the oil production, payable in kind or cash based on the value of the oil at the wellhead. Since the price of the oil, as delivered at refineries in the lower 48 states, is fixed in relation to world oil prices, the value at the wellhead is in inverse relation to the cost of pipeline transport. Alaska also imposes a "severance tax" which is measured as a percentage of value at the wellhead. *See* App. A-4.

groups, also asserted a financial interest in the oil, through statutory entitlement to recover 2% of Alaska's royalty interest, but subject to a ceiling of $500 million.[6] The Antitrust Division contended that the carriers' rates were excessive and would discourage independent oil companies from developing Arctic slope leases in competition with the carriers' affiliates. Consumer interests did not protest the tariffs, as the price of crude oil delivered at the refinery is not affected by the cost of pipeline transport.

In addition to requesting a formal investigation of TAPS tariff rates, all four protestants urged the Commission to suspend the original TAPS tariffs and establish "interim" rates at a much lower level, at which the carrier would be permitted to operate during the seven-month suspension period. The Commission's Bureau of Investigations and Enforcement asserted that once such interim rates were fixed in a suspension order the carriers must adopt and file them or else face prosecution for failure to perform their duties as common carriers. App. I. The Antitrust Division warned the carriers that failure to acquiesce in a Commission order fixing interim rates would prompt consideration of action pursuant to the Sherman Act. App. H.

[6] Although ASRC is to receive the full cash amount in any case, it expects to receive full payment somewhat sooner if TAPS tariffs are minimized.

Although the carriers had an opportunity to participate in oral argument, the Commission took no evidence. The carriers sought to explain and justify their tariffs in summary fashion but also contended that the suspension of original rates and the fixing of "interim" rates were illegal under the Act. 49 U.S.C. §§ 15(1), 15(7).

Rejecting these arguments, the Commission entered an order on June 28 in which it: (1) suspended the TAPS tariffs as filed by Mobil Alaska and six other TAPS owners for the maximum seven-month period specified in 49 U.S.C. § 15(7);[7] (2) instituted a formal adjudicatory investigation into the lawfulness of the rates in the suspended tariff schedules pursuant to 49 U.S.C. § 15(1); (3) authorized the TAPS owners to refile, on one day's notice, "interim rates" at lower levels fixed in the order; and (4) conditioned the effectiveness of both the original tariffs and the prescribed "interim" tariffs on the carriers' undertaking to make refunds to shippers in the event that the Commission ultimately determined that the interim rates or original rates (which would go into effect if the investigation had not been completed before the expiration of the suspension period) were too high. The Commission acknowledged that under the statutory scheme "the carriers may have no means of obtaining restitution" if the Commission should ultimately determine that it had fixed the interim rates too low. App. C-7. The Commission also acknowledged that if it allowed the carriers' original rates to go into effect and later adjudged them excessive, the carriers would be required to refund any excess previously collected. App. C-7, C-5.[8] Nonetheless, the Commission concluded that suspension was justified on the ground that protestants had made "a showing o[f] probable unlawfulness." The Commission stated, however, that suspension "without allowing interim rates" would be "contrary to the interests of all concerned" (App. C-7) and that "the power to allow interim rates is inherent in the suspension power." App. C-6. The interim rate prescribed for petitioner Mobil Alaska was 23% less than its original rate.[9]

The Commission calculated its interim rates "for the most part" with cost data informally supplied by the carriers, which it used to arrive at a "staff estimate" of the value of each carrier's interest in the pipeline. *See* App. C-17, C-24. Using an assumed throughput of 1.2 million barrels per day, the Commission fixed each

[7] The tariff of Phillips Alaska Pipeline Corp., the eighth owner, was filed later and was also suspended.

[8] Liability to pay reparations equal to the "full amount of damages" caused by the carrier's previous exaction of an excessive rate, together with interest (*Louisville & N.R.R.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925)), would arise under 49 U.S.C. § 8. Reasonable attorney's fees may also be charged in connection with such reparations. *Interstate Commerce Comm'n* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576 (1966).

[9] A comparison of the carriers' original rates and the Commission's interim rates is set forth below.

	TAPS Co. Rates	"Interim" Rates	Reduction
Amerada Hess Pipeline Corp.	$6.44	$4.85	$1.59
Arco Pipeline Company	6.04	4.91	1.13
BP Pipelines Inc.	6.35	4.68	1.67
Exxon Pipeline Company	6.27	5.10	1.17
Mobil Alaska Pipeline Company	6.31	4.84	1.47
Phillips Alaska Pipeline Corp.	6.22	4.87	1.35
Sohio Pipe Line Company	6.16	4.70	1.46
Union Alaska Pipeline Company	6.09	4.89	1.20

carrier's tariff at a figure which it estimated would yield an annual revenue, before deduction of interest, equal to 10% of the estimated valuation. App. C-10, C-11.

Without stating reasons or considering the evidence that might have been offered at an evidentiary hearing, the Commission concluded that its interim rates would provide a return on equity sufficient to attract capital under the standard of *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). App. C-11, C-12.

PROCEEDINGS IN THE COURT OF APPEALS

Pursuant to 28 U.S.C. §§ 2321(a) and 2342(5) (1976), petitioner Mobil Alaska, subsequently joined by the other carriers, invoked the jurisdiction of the Court of Appeals to review and reverse the order of the Interstate Commerce Commission, on the ground that the Commission had exceeded its authority and that its order would cause irreparable injury. Petitioner also sought injunctive relief pursuant to the All Writs Act, 28 U.S.C. § 1651(a). Venue was properly laid in the Fifth Circuit, as Mobil Alaska's principal office is at Dallas, Texas. 28 U.S.C. § 2343.

In a decision rendered at about the same time as the first oil reached Valdez, a divided panel of the Court of Appeals dismissed petitioner's case. Declaring that the language of 49 U.S.C. § 15(7), had no "plain meaning," the majority concluded that the Commission was empowered to suspend an original tariff, and that such a decision was not reviewable under the statute. App. A-10—A-12. The majority appeared to agree that the Commission had no power to fix interim rates, but

held that the Commission had not in fact done so; it had merely "partially waive[d]" its discretionary power to suspend, giving the carrier a choice of operating on the Commission's terms or not at all. App. A-13. *See* 49 U.S.C. § 6(7). Acknowledging that constitutional standards might require that, in some cases, a court should review the action of the Commission in fixing a maximum interim rate, the majority stated that a record which would permit such review was lacking in the present case. App. A-16. The majority acknowledged that TAPS losses would be "irretrievable" and that the carriers estimated these losses at $340 million. App. A-9.

In dissent, Circuit Judge Roney argued that in fixing a maximum interim rate the Commission had exceeded its power to suspend a tariff. He was prepared to assume, without deciding, that the Commission could suspend a pipeline carrier's original tariff, but would have held such suspension reviewable where the absence of pre-existing rates left the carrier without any tariff. App. A-18. In his view, however, if the Commission did seek to fix interim rates, it was required to do so in accordance with procedural standards and upon a hearing record which afforded a basis for judicial review. App. A-19. He also concluded that "the interim tariff itself appears to be based on a rate of return more akin to that of corporate bonds than to the speculative risks of equity capital," and that it was "arrived at without sufficient supportive evidence concerning the speculative nature of these investments or the appropriate rate therefor." App. A-25.

Following the decision of the Court of Appeals petitioner was compelled, in order to limit its losses, to file on August 3, 1977, an interim tariff as fixed by

the Commission. Petitioner is now operating at that interim rate and is incurring substantial revenue losses day by day measured by the difference between its original rate (whose legality the Commission is now adjudicating under the procedures of the Hepburn Act), and the interim rate. The Commission's order acknowledges that on January 29, 1978 the original tariff will take effect unless the Commission has previously completed its review and found that tariff to be unlawful. App. C-14.[10]

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS RAISES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

The purpose of the suspension power is to permit the Commission to preserve the status quo—to maintain transportation services at existing rates and levels —while it investigates the legality of a proposed change. Never before has the Commission sought to utilize the suspension power in order to compel a pipeline either to stand idle or to commence operations on terms summarily dictated by the Commission. The Commission has purported to exercise an arbitrary power which it previously has held it is "without jurisdiction" to exercise under the Mann-Elkins Act.[11] The notion that the Commission may fix interim rates without fair hearing and without effective opportunity for

[10] A motion to extend the suspension period beyond the seven months specified in the statute and the Commission order is pending before the Commission.

[11] *See Restriction In Routing Between Greenwood and Augusta*, 165 I.C.C. 3 (1930), *aff'd sub nom. Atlantic Coast Line R.R.* v. *United States*, 48 F.2d 239, 245 (W.D.S.C. 1931), *aff'd*, 284 U.S. 288 (1932).

judicial review is inconsistent with essential principles of private property and due process of law. The decision of the Court of Appeals introduces a novel element of unfairness into the regulatory scheme established by Congress, and can only make it more difficult to find other sources of private capital in the United States willing to undertake further projects of public transportation.

The decision of the Court of Appeals raises important questions which have not been, but should be, settled by this Court. *United States* v. *Students Challenging Regulatory Agency Procedures,* 412 U.S. 669 (1973) (*"SCRAP I"*), left unresolved the recurrent question whether a rate suspension order is entirely immune from review. *Id.* at 698 n. 22. Subsequently, this Court suggested that, as a corollary to the suspension power, the Commission might give the carrier a choice between suspension of a tariff increase and acceptance of such increase with conditions "tailored far more precisely to the particular circumstances presented." *United States* v. *Chesapeake & Ohio Railroad,* 426 U.S. 500, 514 (1976) (*"Chessie"*). But the limits of this corollary power were not defined. And the Commission has gone far beyond the rule of the *Chessie* case in its summary establishment of an interim rate, in a manner which contravenes the requirement of "full hearing" for rate making under the Hepburn Act. *See, e.g., Morgan* v. *United States,* 298 U.S. 468 (1936); *Interstate Commerce Commission* v. *Louisville & Nashville Railroad,* 227 U.S. 88 (1913). The Fifth Circuit's decision in this case also conflicts with a decision of the Court of Appeals for the District of Columbia Circuit, which held that a regulatory commission may not use the suspension power to coerce

establishment of rates by a carrier in a manner which frustrates the statutory procedures for rate making. *See Moss* v. *Civil Aeronautics Board,* 430 F.2d 891 (D.C. Cir. 1970). Resolution of the questions raised in this case is important to common carriers subject to Part I of the Interstate Commerce Act, and also to the industries subject to regulation under other legislation modeled on Part I of the Interstate Commerce Act.[12]

II. THE COMMISSION HAS ABUSED THE SUSPENSION POWER BY EXERCISING IT IN A MANNER NOT INTENDED BY CONGRESS

The decision of the Court of Appeals introduces a novel and arbitrary element of unfairness into the general regulatory scheme which has been established by Congress and by the decisions of this Court. Under the Interstate Commerce Act a railroad or pipeline carrier is entitled "to initiate rates and, in this connection, to adopt such policy of rate-making as to it seems wise." *United States* v. *Illinois Central Railroad,* 263 U.S. 515, 522 (1924). *Accord, Aberdeen & Rockfish Railroad* v. *Students Challenging Regulatory Agency Procedures,* 422 U.S. 289, 311 (1975) (*"SCRAP II"*); *United States* v. *Students Challeng-*

[12] Numerous statutes were modeled upon the rate making and suspension provisions at issue in this case and contain identical or very similar relevant language. *See, e.g.,* Federal Aviation Act, 49 U.S.C. §§ 1482(d) (rate making), 1482(g) (suspension); Federal Power Act, 16 U.S.C. §§ 824d(e) (suspension), 824e(a) (rate making); Natural Gas Act, 15 U.S.C. §§ 717c(e) (suspension), 717d (a) (rate making). Also patterned on these provisions were similar sections of parts II-IV of the Interstate Commerce Act regulating motor carriers, 49 U.S.C. §§ 316(e) (rate making), 316(g) (suspension); water carriers, 49 U.S.C. §§ 907(b) (rate making), 907 (g) (suspension); and freight forwarders, 49 U.S.C. §§ 1006(b) (rate making), 1006(e) (suspension).

ing Regulatory Agency Procedures, 412 U.S. 669, 672 (1973) (*"SCRAP I"*). Under the Hepburn Act,[13] the Commission's power to set rates arises only when rates are examined and determined to be unlawful "after full hearing." When such a determination is made the carrier is liable for reparations equal to the "full amount of damages" caused by the carrier's previous exaction of an excessive rate, 49 U.S.C. § 8, together with interest, *Louisville & Nashville Railroad* v. *Sloss-Sheffield Steel & Iron Co.,* 269 U.S. 217 (1925), and reasonable attorney's fees, *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.,* 383 U.S. 576, 580-81 (1966). The Mann-Elkins Act[14] authorizes the Commission to suspend proposed changes in rates before they become effective and to postpone the effective date of such changes, maintaining the status quo of transportation for up to seven months while the rates are investigated under the procedures of the Hepburn Act. The Mann-Elkins Act does not, however, authorize the Commission to prescribe a rate. It presupposes that when the Commission suspends tariffs containing "new" rates, old rates remain in effect. As Representative Mann explained to a critic of his bill, "when the railroad company then files this schedule of rates proposing to increase the rates, we say it is a reasonable presumption that the rate which has existed, possibly for a long time—but whether for long or short, the one in existence—is a fair rate, and should remain in force until the commission has had an opportunity to give some investigation to the subject. That seems to be fair to the railroad company and fair to the ship-

[13] Section 2 of the Hepburn Act (1906), 34 Stat. 586, as amended, 49 U.S.C. § 15(1).

[14] Section 12 of the Mann-Elkins Act (1910), 36 Stat. 551, as amended, 49 U.S.C. § 15(7).

per." 45 Cong. Rec. 4713 (1910). Moreover, the presumptively lawful pre-existing rate acts as a significant gauge against which the Commission can summarily, but presumably fairly, measure the proposed change in the absence of an evidentiary record.

Just as the suspension power differs from the authority to fix rates under the Hepburn Act, it also differs from the power to fix the terms and conditions upon which a certificate of public convenience and necessity may be granted. While the Commission has been authorized to determine whether to grant such certificates to certain other carriers and reviews original rates in connection with such a grant, *see Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1959), carriers by pipeline require no such certificate. The operation of TAPS was authorized by Congress itself and the vast investment in construction of the pipeline was made in reliance upon that authorization and upon the general rule of the Interstate Commerce Act that rates are to be fixed in the first instance by the carrier at a level which ensures a reasonable return on investment, and that Commission intervention in the rate making process is subject to judicial review. *See Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591, 603 (1944).

The statutory scheme is disrupted by purported exercise of the suspension power where such exercise leaves the carrier without any tariff and effectively forbids the use of his property except on conditions fixed by the Commission without satisfaction of fundamental procedural requirement. *See* 49 U.S.C. § 6(7). In such circumstances, suspension is inconsistent with the policy of the Mann-Elkins Act, which seeks to pre-

serve existing levels of service pending an investigation of proposed changes.

Summary establishment of interim rates, which must be unrelated to any rates previously adopted by the carrier, necessarily prejudges the essential issue which must be determined after full hearing under the Hepburn Act. If the Commission's summary decision is wrong, as it is in this case, there is no subsequent opportunity to recoup from shippers the balance of the fair cost of transportation. Procedures under the Hepburn Act may lead the Commission to conclude that it has made a mistake in fixing its interim rate, but shippers who have taken advantage of that rate cannot be required to pay the balance of the fair cost of transportation. Nor can losses incurred during a lawful suspension period be recouped from subsequent customers of a regulated service. *See Federal Power Commission* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145, 152 (1962). The net effect of the decision of the Court of Appeals, therefore, is to alter the regulatory scheme so as to confer on the Commission arbitrary power to inflict irreparable loss on fledgling carriers without opportunity to recoup those losses or to avoid them by judicial review. This is not the regulatory scheme intended by Congress.

A. Congress Did Not Authorize The Commission To Suspend A Carrier's Original Rates

The statutory language of section 15(7) limits its application to "any schedule stating a new . . . rate . . . , or any new . . . classification, or any new . . . regulation or practice affecting any rate," all subsequently referred to in the section as "the proposed change." The Commission and the court below ignored the "proposed change" language of section 15(7) and focused

instead on the statute's reference to "any schedule stating a new . . . rate," interpreting the modifier "new" to encompass all tariffs not previously in effect.

The reference to "new" rates in the Mann-Elkins Act of 1910, *see* 49 U.S.C. § 15(7), was apparently derived from the term "new schedules" used in the Hepburn Act of 1906, *see* 49 U.S.C. § 6(3). The legislative history of both sections 6(3) and 15(7) indicates that they were intended to be coextensive and that the tariffs that could be suspended under the 1910 Act were intended to be the same as the changed tariffs that the Hepburn Act required to be filed under section 6(3). Original tariffs are not filed under section 6(3), but under section 6(1) of the Act.[15]

As it stood after amendment by the Hepburn Act of 1906, the Interstate Commerce Act contemplated two sorts of filings: the general filing of all tariffs under section 6(1) and the filing of changed tariffs under section 6(3). The drafters of the Mann-Elkins Act of 1910 linked the suspension power to the category of changed tariffs which had recently been established by passage of section 6(3). Thus, President Taft, who proposed enactment of the legislation, pointed out that despite the notice provision of section 6(3) the Commission could not commence investigation of "an increase in rates until after it shall have become effective." H.R. Rep. No. 923, 61st Cong., 2d Sess. 3 (1910). Accordingly, the President advocated legislation to permit commencement of such investigations before the proposed change took effect,

[15] Petitioner became a common carrier subject to the Commission's jurisdiction only upon filing its original tariff pursuant to § 6(1) and commencing crude transportation operations. 49 U.S.C. §§ 1(1), (3).

and also to give the Commission discretion to postpone the new schedule's effective date in order to allow maintenance of service at existing rates while the investigation proceeded. The wording of the first sentence of section 15(7) ("any schedule stating a new . . . rate") remains as proposed by the Taft administration and enacted in 1910. Discussion and report of the language as enacted repeat the theme that the suspension power applied only to the changes subject to section 6(3).[16]

The Commission itself had never previously decided the precise question whether it might suspend a Part I carrier's original rates, filed pursuant to section 6(1) of the Act, but it indicated in a 1930 decision that it was "without jurisdiction" to suspend even an established carrier's original tariff for service on a railway extension not previously served by that carrier. *Restriction In Routing Between Greenwood and Augusta,* 165 I.C.C. 3 (1930), *aff'd sub nom. Atlantic Coast Line Railroad* v. *United States,* 48 F.2d 239, 245 (W.D.S.C. 1931), *aff'd,* 284 U.S. 288 (1932). In 1912 the Commission had reached a similar result, stating that the tariff in question "was the first and only tariff . . . on file here, and an order suspending its operation would have left the wharf company without any lawful rates and would therefore have obliged it either to cease its operation or to handle the traffic of the port in violation of the Act." *In re Wharfage Charges of the Galveston Wharf Co.,* 23 I.C.C. 535, 537 (1912).[17] Commis-

[16] *See, e.g.,* 45 Cong. Rec. 6777, 6778, 6893 (1910) (remarks by Senators Cummins and LaFollette). The Senate Committee majority referred to the rates to be suspended as any "proposed increase in rates, or change in classification." S. Rep. No. 355, 61st Cong., 2d Sess. 9 (1910). The minority described the suspension power as "the power to suspend changes in rates pending a hearing upon the propriety of the change." *Id.* minority statement at 9.

[17] For purposes of another provision of § 15(7), the Commission

sion regulations interpreting suspension pursuant to section 15(7) presuppose the existence of an "old" rate. For example, upon suspension of an entire pipeline or railroad tariff "the previous tariff and effective supplements are continued in effect and remain in effect during the period of suspension." 49 C.F.R. § 1300.9(k)(5) (1976). *See generally* 49 C.F.R. Part 1300 (1976). Similarly, the Federal Power Commission, whose suspension power is defined in terms nearly identical to section 15(7),[18] has held by rule that suspension does not extend to initial rate schedules. 18 C.F.R. §§ 2.4(d), 2.52 (1977).[19]

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has developed a special category of "initial rates," which it uses to refer, not to a carrier's original rates filed under § 6(1), but to rates for new services offered by established carriers and filed under § 6(3). This special category has developed because, as enacted in 1910, § 15(7) placed upon the carrier "the burden of proof to show that the increased rate or proposed increased rate is just and reasonable." 36 Stat. 552. Carriers who could show that the new rate was a decrease or that it concerned a somewhat novel service (an "initial rate") did not have to sustain this burden of proof, although any change in their prior practices might be suspended. *See, e.g., Cotton from New Orleans*, 49 I.C.C. 751 (1918) (carrier changed former practice and filed rate for delivery at a city not previously directly served). In 1940, Congress amended the statute to place on the carrier the burden of justifying any "changed rate," not just increases (Transportation Act of 1940, ch. 722, Title I, § 10(e), 54 Stat. 912), but the Commission has regarded its category of "initial rates" as unaffected by the change. *See, e.g., Rail-Water, Grain in Bulk, Missouri, Illinois and Indiana to Buffalo*, 321 I.C.C. 564 (1963) (carriers with prior individual tariffs filed joint "initial tariff" for new combined service).

[18] Federal Power Act, § 205, 16 U.S.C. § 824d(e); Natural Gas Act, § 4(e), 15 U.S.C. § 717c(e) (1976).

[19] This Court has also appeared to understand the reference to "any schedule stating a new . . . rate . . ." as synonymous with "proposed change[s]." *See SCRAP II*, 422 U.S. at 297; *SCRAP I*, 412 U.S. at 697; *Atchison, T. & S.F.R.Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 820 (1973); *Arrow Trans. Co.* v. *Southern Ry. Co.*, 372 U.S. 658, 665 n.10 (1963).

The Fifth Circuit disregarded the previous practice under this and related statutes and held that the suspension power did extend to original tariffs. It reached that conclusion on the ground that, when Congress subsequently enacted other statutes modeled on section 15(7) of the Interstate Commerce Act, it took care on several occasions to provide that suspension did not apply to any initial rate (*see* Federal Aviation Act, 49 U.S.C. § 1482(g)), or that it did not apply to an initial rate filed prior to a cut off date after which the Commission was empowered to prevent new entry into the business by withholding certificates of public convenience and necessity. App. A-11—A-12.[20] In the view of the Court of Appeals, the fact that subsequent Congresses had resorted to specific language to ensure that original tariffs were not subject to suspension indicated that such tariffs were subject to suspension if previous Congresses had failed to insert a proviso. App. A-12. In reaching that conclusion, however, the Court of Appeals disregarded the intent of the Congress which enacted the Mann-Elkins Act itself. This Court has often observed that "[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960). *Accord, Rainwater* v. *United States*, 356 U.S. 590, 593 (1958); *Fogarty* v. *United States*, 340 U.S. 8, 13-14 (1950).[21]

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[20] The suspension provisions cited by the Fifth Circuit included 49 U.S.C. §§ 316(g) (motor carriers); 907(g), (i) (water carriers); 1006(e) (freight forwarders). A certificate of public convenience and necessity (or a "permit" for freight forwarders) must be obtained as a prerequisite to operation under each of these chapters. 49 U.S.C. §§ 306(a)(1) (motor carriers); 909(a) (water carriers); 1010(a)(1) (freight forwarders).

[21] Another reason advanced below for applying suspension to an

B. The Commission May Suspend A Tariff In Order To Preserve The Status Quo Of Transportation, Not To Compel Operation At A Rate Fixed By Itself

As Circuit Judge Roney observed in dissent, the Commission's order constitutes "rate making." App. A-17. The majority characterized it as "partial waiver" of suspension, but this exalts form over substance in a manner other courts have not tolerated in like circumstances.[22] By prohibiting business operations for seven months except on terms which it dictates, the Commission denies the carrier any real choice and effectively compels operation at rates summarily fixed by itself.[23] *See* 49 U.S.C. § 6(7). By so doing the Commission frustrates the policies of the Hepburn Act, which permits establishment of a rate only after full hearing. And it suspends the carrier's rate, not in order to preserve the status quo pending investigation, but to compel operation at a rate fixed by itself pursuant to summary and unlawful procedures.

The situation is different where the carrier has previously operated at its own rate. There, suspension of

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original TAPS tariff is the need to act in case a patently outrageous tariff is filed. But suspension of an "outrageous" original rate merely means that no shipment can occur. Congress may have felt that shipment at an "outrageous" rate was preferable to blockage of all shipments, particularly since the Hepburn Act held out the promise of full reparation, plus interest and attorneys' fees, once the Commission had held its full hearing and determined that the carrier's rate was indeed excessive.

[22] *E.g., American Tel. & Tel. Co.* v. *Federal Communications Comm'n*, 487 F.2d 865, 874-75 (2d Cir. 1973); *Moss* v. *Civil Aeronautics Bd.*, 430 F.2d 891 (D.C. Cir. 1970).

[23] Indeed, the Commission's Bureau of Investigations and Enforcement and the Antitrust Division made the coercive intent very clear. *See supra* at 7, and App. H, App. I.

an increased rate leaves the carrier free to continue during the suspension period at rates which it formerly found satisfactory. A Commission decision to allow any increase over the pre-existing rate during the suspension period, though questionable under the statute, is not likely to arouse opposition from the carrier.[24] Unlike the decision to allow a partial increase during a suspension period, the establishment of an interim tariff at a rate below that of the carrier's original tariff constitutes a pre-judgment of the essential issue which, under the Hepburn Act, the Commission is to decide only after "full hearing."

Where regulatory agencies have employed the suspension power as a vehicle to prescribe rates in a manner which frustrates the policy of the statute and seeks to escape judicial review, courts have not hesitated to intervene. In *Moss* v. *Civil Aeronautics Board,* 430 F.2d 891 (D.C. Cir. 1970), the court struck down the threatened use of the suspension power to block rates exceeding those "suggested" by the Board. The court did so on the ground that such action constituted economic coercion and prescription of rates, in frustration of the statutory procedures for rate making. Both the Fifth Circuit majority and the Commission purport to distinguish the illegal *Moss* order as having permanent rather than interim effect. App. C-6, A-14. Yet the Commission's order will indeed result in a permanent loss.[25]

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[24] *See Port of New York Authority* v. *United States,* 451 F.2d 783 (2d Cir. 1971).

[25] Judge Roney observed that the amounts at issue were likely to be greater than those typically at issue in "permanent" ICC proceedings. App. A-18. In the proceedings before the court of appeals it was estimated that Mobil Alaska would lose $18 million and that

The recent decision in *United States* v. *Chesapeake & Ohio Railroad,* 426 U.S. 500 (1976) (*"Chessie"*) did not authorize use of the suspension power to dictate rates. Nor did *Chessie* authorize the other conditions which the Commission imposed on the carrier's right to operate during the suspension period.[28] In *Chessie* the Commission authorized refiling of suspended rate increases on condition that the carriers agree to devote the additional revenues to capital improvements and deferred maintenance, precisely the needs which the carriers had themselves advanced to justify their proposed increases. That order was described as "a more measured course . . . an alternative [to suspension] tailored far more precisely to the particular circumstances presented." 426 U.S. at 514.

We believe the Court was influenced in *Chessie* by the fact that carriers were given a choice between two options which the carriers, and not the Commission, had articulated. *Id.* at 515. Neither the interim rates of the June 28 order nor the closing down of TAPS for seven months is a carrier-formulated alternative.

The Commission's course of action here cannot be characterized as a "more measured course." Nor is imposition of an interim rate a "precisely tailored" alternative. It does not protect the carriers, as the *Chessie* decision did, and it constitutes a prejudgment of issues which the Commission is obliged to decide in accordance with the procedures of the Hepburn Act.

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total TAPS losses would exceed $340 million during the suspension period (App. A-18), based on the estimated throughput of 1.2 million barrels per day.

[28] *See* App. A-15—A-16 and question 5 in Questions Presented, *supra* at 4.

C. If The Commission May Fix An Interim Rate, It Must Do So After Fair Hearing And On A Record Which Permits Judicial Review

Unlike the exercise of the suspension power, the establishment of rates has traditionally been subject to judicial review. *See, e.g., Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944). And as one court has noted, "[a] suspension decision which effectively blackmails the carriers into submitting agency-authored rates is functionally indistinguishable from an agency order setting those rates and such orders are, of course, judicially reviewable." *SCRAP* v. *United States,* 346 F. Supp. 189, 197 (D.D.C. 1972), *rev'd on other grounds,* 412 U.S. 669 (1973).

The Hepburn Act, amending section 15 of the Interstate Commerce Act, provides that the Commission may fix rates after full hearing and on the basis of substantial record evidence. A "full hearing" under section 15(1) must afford a right to introduce testimony and to be fully apprised of the evidence submitted or to be considered, and an opportunity to conduct discovery and offer evidence by way of explanation or rebuttal. *Interstate Commerce Commission* v. *Louisville & Nashville Railroad,* 227 U.S. 88, 91, 93 (1913). In addition, there must be evidence adequate to support pertinent and necessary findings of fact. *Morgan* v. *United States,* 298 U.S. 468, 480 (1936). At a minimum the Commission should be required to provide fair and reasonable procedures which result in a reasoned decision of controverted issues upon a record

which permits judicial review. *See Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 167-74 (1962); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad,* 294 U.S. 499 (1935).

In the instant case the record before the Commission contained no evidence at all; certainly there was no evidence to support its declaration that an annual 10% gross return on the value of the pipeline investment would be adequate to attract such investment, the test laid down by the Court in *Hope Natural Gas,* 320 U.S. at 603. The carriers had no effective opportunity to show why a greater return was necessary to cover the costs of operation and interest payments and to allow an adequate return commensurate with the risks of the business. Circuit Judge Roney found the Commission's return "more akin to that of corporate bonds than to the speculative risks of equity capital." App. A-25.

The Commission's order rejects the past practice of carriers to obtain a net return, after deduction of interest, equal to a percentage of the pipeline's valuation. Changes in regulatory standards or policies must be explained. *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade,* 412 U.S. 800 (1973); *Securities & Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194 (1947). Yet without explanation the Commission articulates for the first time a rule which would establish a tariff based on a gross return, without deduction of interest costs. The Commission's order gave no reason for this decision even though oral argument at the suspension hearing centered on this issue.

The refusal of the Fifth Circuit majority to review those portions of the order imposing the interim rate condition appears to conflict with the decision in *United States* v. *Chesapeake & Ohio Railroad,* 426 U.S. 500 (1976), in which this Court remanded the case to allow review of the question whether the conditions there imposed were "arbitrary and capricious." 426 U.S. at 515.

CONCLUSION

In sum, the Court of Appeals' conclusion that the Commission may suspend petitioner's original tariff and establish interim rates without opportunity for judicial review cannot be reconciled with essential principles of regulatory due process under the Interstate Commerce Act. The decision disregards the traditional assurance that a carrier may operate under a rate fixed by itself or fixed by the Commission after full hearing and with right of review. It renders unfair the traditional rule that losses incurred during a suspension period cannot be recouped. The decision undermines the traditional procedural protections which have been afforded private investment in regulated

industries and accordingly warrants review by this Court on writ of certiorari.

Respectfully submitted,

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September 21, 1977

Appendices

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2392

MOBIL ALASKA PIPELINE COMPANY, *Petitioner*,
v.
UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, ET AL,
Respondents,
and
SOHIO PIPE LINE COMPANY,
AMERADA HESS PIPELINE CORPORATION,
UNION ALASKA PIPELINE COMPANY, *Intervening Petitioners*,
STATE OF ALASKA, ARCTIC SLOPE
REGIONAL CORPORATION, *Intervening Respondents*.

No. 77-2412

BP PIPELINES, INC., *Petitioner*,
v.
UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, *Respondents*.

No. 77-2421

EXXON PIPELINE COMPANY, *Petitioner*,
v.
UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, *Respondents*,
and
UNION ALASKA PIPELINE COMPANY, *Intervening Petitioner*.

No. 77-2437

ARCO PIPE LINE COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, ET AL,
Respondents,

STATE OF ALASKA, *Intervening Respondent*.

ON PETITIONS TO REVIEW AN ORDER OF THE
INTERSTATE COMMERCE COMMISSION

July 29, 1977

Before BROWN, Chief Judge, GODBOLD and RONEY, Circuit Judges. PER CURIAM:

Four petitions seeking injunctive relief and review of a June 28, 1977 Order of the Interstate Commerce Commission are before us, together with the United States' motion to dismiss.[1] For reasons discussed below, we grant the government's motion.

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[1] No. 77-2392, Petition of Mobil Alaska Pipeline Company (Mobil) to Annul, Set Aside and Enjoin Enforcement of an Order of the Interstate Commerce Commission and Applications and Motions for Temporary Restraining Order and Interlocutory Injunction. The respondents in this case were the United States, the Interstate Commerce Commission (ICC or Commission) and the latter's individual Commissioners. The State of Alaska moved to appear as a party. The Arctic Slope Regional Corporation moved to intervene. Both opposed Mobil's petition. Sohio Pipe Line Company moved to appear as a party in support of Mobil's petition, as did Amerada Hess Pipeline Corporation. Union Alaska Pipeline Company moved to appear as a party.

No. 77-2412, Petition to Enjoin, Set Aside, Suspend and Review Order of the Interstate Commerce Commission and Motion to Stay, Restrain and Suspend Order of the Interstate Commerce Commission filed by BP Pipelines, Inc. (BP), naming the United States and the ICC as respondents.

No. 77-2437, Petition for Review and Application for Interlocutory Injunction filed by Arco Pipe Line Company (Arco). The United States, the ICC and its individual Commissioners were named as respondents. Alaska also sought leave to appear as a party in opposition to Arco's petition.

No. 77-2421, Petition for Review and Motion for Expedited Consideration or, in the Alternative, for a Stay Pending Review, filed by Exxon Pipeline Company (Exxon), naming the ICC and the United States as respondents. Union Alaska Pipeline Company moved to appear as a party.

The United States moved for consolidation and to dismiss. The motion for consolidation was granted from the Bench during oral argument on July 19, 1977. The court hereby grants all motions to intervene.

BACKGROUND OF THE CASE

This controversy arose on the eve of the flow of crude oil through the Trans Alaska Pipeline System (TAPS)[2] which stretches from oil fields in Alaska's North Slope at Prudhoe Bay to Valdez, Alaska, some 800 miles distant. The pipeline was constructed by the Alyeska Pipeline Service Corporation, an agent for its eight owners.[3]

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[2] In 1968 massive reservoirs of oil were discovered at Prudhoe Bay. Plans to construct the pipeline were announced in 1970. From its beginning the pipeline has been grist for judicial mills. *See, e.g., Wilderness Society* v. *Morton*, 479 F.2d 842 C.A.D.C., 1975) (en banc); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), *rev'g* 495 F.2d 1026 (C.A.D.C., 1974). Indeed, it literally took an act of Congress to prevent further environmental litigation. Trans-Alaska Pipeline Act, 43 U.S.C.A. § 1652(d). Construction was thus delayed until 1974 and took three years.

Oil began to enter the pipeline on June 20, 1977. An explosion and fire at pump station No. 8 on July 8, 1977, resulted in a temporary shutdown. The parties have informed the court that the first oil is expected to reach Valdez around July 26, 1977.

[3] Each of the following companies owns an undivided interest in TAPS:

Between May 27, 1977 and June 15, 1977, seven TAPS owners filed the tariffs [4] which are at issue here,[5] having effective dates ranging from June 20 to July 1, 1977. Protests were filed by the Department of Justice, the State of Alaska,[6] the Arctic Slope Regional Corporation,[7] and the

Company	*Percentage Ownership*
Mobil Alaska Pipeline Co.	5.00%
Sohio Pipe Line Co.	33.34%
ARCO Pipe Line Co.	21.00%
Exxon Pipeline Co.	20.00%
BP Pipelines Inc.	15.84%
Phillips Alaska Pipeline Corp.	1.66%
Union Alaska Pipeline Co.	1.66%
Amerada Hess Pipeline Corp.	1.50%

These companies are subject to ICC regulation by virtue of the Interstate Commerce Act, 49 U.S.C.A. § 1(1)(b), which covers common carriers engaged in the transportation of oil by pipeline.

[4] Tariffs must be filed with the ICC pursuant to 49 U.S.C.A. § 6(1).

[5] Because Phillips, the eighth owner, filed its tariff on June 20, 1977 with an effective date of July 20, the time for filing protests had not expired by June 28, the date of the ICC's order. Phillips' tariff was thus not covered by the Order and is not before this Court.

[6] Alaska owns a one-eighth royalty interest in the oil from the Prudhoe Bay fields. In addition, Alaska has an oil production severance tax. Both the value of the royalty oil and the severance tax are tied to the value of the oil at the point of production, *i.e.*, the wellhead value. Alaska contends that the wellhead value is generally determined by the market price *less* the transportation costs. Therefore, as the TAPS carrier rates increase, the value of Alaska's interest decreases.

[7] Prior to the enactment of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C.A. §§ 1601-1627, the Inupiat Eskimos held claims of unextinguished aboriginal title to the entire Arctic Slope of the State of Alaska, an area which encompasses Prudhoe Bay and much of the land over which TAPS was constructed. The Arctic Slope Regional Corporation is one of 12 corporations established pursuant to ANCSA to conduct Native Alaskan business for profit. 43 U.S.C.A. § 1606. As compensation for the extinguish-

ment of all aboriginal land claims, ANCSA granted Alaskan Natives fee title to approximately 100 million acres of land. 43 U.S.C.A. §§ 1611, 1613. All future revenues derived from that land will be the property of the Native people. 43 U.S.C.A. § 1606. ANCSA further provided for cash compensation of $962,500,000 to be paid over a period of years, a portion of which is to be derived from a 2% royalty on the wellhead value of all crude oil production in Alaska under state or federal leases. 43 U.S.C.A. §§ 1605, 1608. Thus, on their theory, the Native Alaskans' revenue is inversely related to the rise in TAPS tariffs.

[8] Recognizing the importance of the controversy, the ICC, in an extraordinary move, bypassed its usual procedural channels and took the suspension proceeding for its own direct consideration. While Commission regulations consider a protest and petition to suspend "as addressed to the discretion of the Commission," 49 C.F.R. § 1100.42 (1976), suspension protests and petitions are in practice routinely referred to the Board of Suspension. See 49 C.F.R. § 1100.200 (1976); Mobil Memorandum In Support of Application for Interlocutory and Temporary Restraining Order at 7; Reply of Interstate Commerce Commission in Opposition To Application For Interlocutory Injunction and Temporary Restraining Order at 4. The Commission heard arguments for one full day before issuing its suspension order.

Although a transcript of that hearing was made, the papers on file with the Court contain only excerpts from that proceeding. *E.g.*, Appendix A to Justice Department's Memorandum in Support of Motion to Dismiss; Appendix C to Memorandum of the State of Alaska in Opposition to Application for Interlocutory Injunction and Temporary Restraining Order. Also, the tariff filings themselves, with any supporting submissions, were not filed with the Court. On file with the Court, however, were several exhibits such as "Reply of Exxon Pipeline Company to Protests" (Appendices of Exxon Pipeline Company for Expedited Consideration or in the Alternative Stay Pending Review) and Statements by C. R. Thompson, Controller-Treasurer of Mobil Alaska Pipeline Co. (Appendix D to Memorandum of the State of Alaska in Opposition to Application for Interlocutory Injunction and Temporary Restraining Order).

[8a] The briefs of the parties contained references to the infor-

ICC's Bureau of Investigation and Enforcement. The Commission heard oral argument on June 27, 1977 [8] without making any formal evidentiary record.[8a]

The ICC's June 28 Order [9] instituted an investigation into the lawfulness of the tariffs pursuant to 49 U.S.C.A. §§ 15(1)[10] and 15(7).[11] The rates filed were suspended for

mation which the ICC apparently had before it during the suspension proceeding. Such information included: (i) written representations in the form of protests from the State of Alaska, the Arctic Slope Regional Corporation, the United States Department of Justice, and the Bureau of Investigations and Enforcement of the ICC (Memorandum of the State of Alaska in Opposition to Applications for Interlocutory Injunction and Temporary Restraining Order at 2); (ii) verified statements offered by the TAPS Carriers in support of their rate calculations (Memorandum in Support of Exxon Pipeline Company's Motion for Expedited Consideration or, in the Alternative, for a Stay Pending Review at 46) [hereinafter Exxon Memorandum]; (iii) statement of Dr. Michael J. Ileo (submitted with Alaska's protest) which discusses the unreasonableness of carriers' rate calculations (Exxon Memorandum at 46); (iv) sworn testimony of Raymond B. Gary, a Managing Director of Morgan Stanley & Company, and Dr. Ezra Solomon, Dean Witter, Professor of Finance at the Graduate School of Business of Stanford University, filed in Ex Parte No. 308, *Valuation of Common Carrier Pipelines* (Exxon Memorandum at 38); (v) letters sent from Mobil Alaska Company to ICC (obtained under the Freedom of Information Act, 5 U.S.C.A. § 552) which deal with such topics as TAPS start-up, depreciation, dismantling and restoration, anticipated salvage, and estimated annual operating expenses (Memorandum of the State of Alaska in Opposition to Applications for Interlocutory Injunction and Temporary Restraining Order at 25-6); (vi) calculation of the rates of return on valuation for 90 regulated pipelines for the years 1970-72, made by George M. Stafford, former ICC Chairman (Exxon Memorandum at 40-1); and (vii) a variety of carrier-provided data concerning the normal traffic volume for the beginning years of TAPS, costs, depreciation charges, and investment calculations (ICC June 28 Order at 5-7 and Appendices to Order).

[9] The Order is set forth as an Appendix to this opinion.

[10] 15 U.S.C.A. § 15(1) reads in pertinent part as follows:

> "Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending

seven months without prejudice to the filing of interim rates during the suspension period. The Commission addi-

> complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title . . . is or will be unjust or unreasonable . . . the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged . . . and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be . . . ."

[11] 15 U.S.C.A. § 15(7):

> "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes

tionally authorized the filing, upon not less than one day's notice, of interim rates which were not to exceed certain levels, subject, however, to the condition that the carriers keep account and that (i) the interim tariffs contain a refund provision to the effect that if the new rates exceed those subsequently authorized or prescribed by the ICC, the carriers will refund the excess with interest; and (ii) the carriers file a similar refund provision applicable to the original proposed rates. The Order thus had the following effect on the carriers' proposed rates per barrel:

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into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. . . ."

	As Filed by TAPS Owners	Authorized By Order [12]	Reduction
Amerada Hess Pipeline Corp.	$6.44	$4.85	$1.59
Arco Pipe Line Company	6.04	4.91	1.13
BP Pipelines Inc.	6.35	4.68	1.67
Exxon Pipeline Company	6.27	5.10	1.17
Mobil Alaska Pipeline Company	6.31	4.84	1.47
Phillips Alaska Pipeline Corp.	6.22	Not Yet Acted Upon	
Sohio Pipe Line Company	6.16	4.70	1.46
Union Alaska Pipeline Company	6.09	4.89	1.20

The carriers estimate that the Order will result in an irretrievable $340 million loss over the seven-month suspension period.

The suspension left the pipeline companies without tariffs on file, and they are forbidden by § 6(7) of the Act to engage or participate in the transportation of oil unless they file new tariffs. The carriers thus had two alternatives open to them. They could file new tariffs within the ICC guidelines or they could shut down the TAPS system for the seven-month suspension period. Unhappy with either choice, the pipeline companies filed their petitions and motions and the United States moved to dismiss.[13] This Court heard oral argument on July 19, 1977.

The major issues raised by the parties are (i) whether we have jurisdiction to review the ICC order; (ii) whether the Commission has the authority under 49 U.S.C.A. § 15(7)

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[12] According to the ICC, these rates reflect a 10% rate of return on tentative valuation. See pp. 4-8 of the ICC Order, and Appendices 2-5 thereto.

[13] *See* note 1, supra.

to suspend the first and only ("initial") rate of a carrier; (iii) whether as part of a purported suspension order the ICC may prescribe or suggest optional maximum interim rates; (iv) whether the ICC's order authorizing the filing of maximum interim rates without a full hearing amounted to a prescription of rates within the meaning of 49 U.S.C.A. § 15(1); (v) whether the Commission acted outside its statutory authority in ordering the refund provisions in the tariffs; (vi) whether the Commission's action was arbitrary, capricious or constituted an abuse of discretion; (vii) whether the maximum interim rates authorized were confiscatory in violation of the Fifth Amendment.

1. *Reviewability and the authority of the Commission*

The government has moved to dismiss the petitions for review on the ground that this court has no jurisdiction to review suspension orders of the ICC issued pursuant to 49 U.S.C.A. § 15(7). True, courts do not have jurisdiction to review ICC suspension orders. Congress has committed the decision to suspend or not to suspend proposed rates exclusively to the discretion of the Commission. *U.S.* v. *Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S. 669, 37 L.Ed.2d 254 (1973); *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, 10 L.Ed.2d 52 (1963); K. Davis, ADMINISTRATIVE LAW TREATISE 966 (1970 Supp.). As a panel of this circuit noted:

> The Interstate Commerce Commission . . . is vested with power to suspend, at its discretion, for a period of seven months, rates filed with it pending hearing and decision on their lawfulness. 49 U.S.C. § 15(7). The existence of this power in the ICC, it has been held, evinces the deliberate decision of Congress to extinguish judicial power to grant any injunction which interferes with the Commission's discretionary decision to suspend rates filed with it at anytime before the Commission finally determines the lawfulness of the rates.

Texas v. *Seatrain International*, 518 F.2d 175 at 178 (CA5, 1975). But the rule of unreviewability presupposes an affirmative answer to a preliminary inquiry into whether the Commission has acted within the authority granted to it by § 15(7). A suit to enjoin a suspension order may be entertained if the complaint shows that the agency lacked the basic statutory authority to issue such an order. *Great Western Packers Express, Inc.* v. *U.S.*, 246 F.Supp. 151, 154 (D.Colo.,1965) (three-judge court); *Long Island Railroad Co.* v. *U.S.*, 193 F.Supp. 795, 800 (E.D.N.Y.,1961) (three-judge court).

Section 15(7) gives the ICC the power to suspend "any schedule stating a new individual or joint rate fare or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate fare or charge" for a period not to exceed seven months, and to order an investigation and full hearings on those new charges. The above language has no plain meaning. The term "new" can refer to both changed and initial rates or only to changed rates. The statutory history of the Mann-Elkins Act (1910), which added § 15(7) to the Interstate Commerce Act, yields little insight on whether the ICC is empowered to suspend initial rates since no one seems to have debated or even discussed this specific question. However, our examination of statutes modeled on § 15(7) and of the legislative policy underlying that section convinces us that it was Congress' intention that the Commission have the power to suspend initial as well as changed rates.

Section 15(7) has served as the prototype of other agency rate suspension provisions in the Interstate Commerce Act and in other regulatory acts as well. In many of these acts, when Congress has wished to exclude initial rates, either in part or across the board, it has done so in specific language. In the Interstate Commerce Act itself, there are provisions modeled on 49 U.S.C.A. § 15(7) giving the ICC authority

to suspend new rates, proposed by motor carriers, 49 U.S.C.A. § 316(g), by water carriers, 49 U.S.C.A. § 907(g)(i), and by freight forwarders, 49 U.S.C.A. § 1006(e). Each of these provisions contains a grandfather clause exempting certain initial rates from suspension. If initial rates were not covered there would have been no need for the grandfather clauses. Another example is 49 U.S.C.A. § 1482(g), which gives the Civil Aeronautics Board suspension powers similar to those granted to the ICC with one significant difference: it specifically provides that "[t]his subsection shall not apply to any initial tariff filed by any air carrier." Thus, we conclude that if Congress had wished to exempt initial tariffs from the purview of § 15(7) it would have done so specifically, and that Congress' omission to specially exempt initial rates in this section indicates its intent that initial rates be subject to the ICC's § 15(7) suspension powers.

The conclusion that initial rates are covered by § 15(7) is consistent with the legislative policy underlying that section. Section 15(7) evidences a belief on the part of Congress that the normal hearing and reparation processes of the ICC are not sufficient to protect the public against potentially excessive charges. The need for this protection is no less in the case of initial rates than in the case of changed rates. Absent a specific legislative decision that initial rates are not covered, it would be illogical to assume that Congress intended to leave such a gap in the legislative scheme.

2. *The suggested interim rates*

The petitioners challenge the action of the Commission with respect to suggested interim rates. They point out that § 15(7) contains no provisions for establishing interim rates and that, in any event, rates can only be prescribed after full hearings. See 49 U.S.C.A. § 15(1). The Commission's position is that it has not actually fixed a rate but, in

a situation of urgent national interest and as an incident of its power to suspend, it has given advance indication of the maximum rates with respect to which—if the carriers elect to file them—the Commission will not exercise its power to suspend.

The Commission Order refers to "interim rates," but baldly describing the issue as the power of the Commission to set interim rates is misleading. As we have held, the Commission had the power to unconditionally suspend the proposed tariffs, leaving the carriers without any tariffs but free to file new tariffs if they wished, which would be subject to new exercise of the Commission's power to suspend. The ICC chose not to exercise to its full limits the drastic but available power of unconditional suspension and instead announced that if petitioners would file interim tariffs at or below Commission-announced ceilings the Commission would not unconditionally suspend the tariffs originally filed.

The petitioners maintain that the § 15(7) power to suspend is an all or nothing instrument. We think not. The Commission may elect to exercise its power less than fully, or putting it another way, may partially waive the suspension power. We are guided by the Supreme Court's decision in *U.S.* v. *Chesapeake & Ohio Railroad Co.*, 426 U.S. 500, 49 L.Ed.2d 14 (1976) ("*Chessie*"). In *Chessie* the ICC suspended a carrier-proposed tariff increase but at the same time authorized the railroads to refile, incorporating conditions which would assure that the additional revenue would be expended on capital improvements and deferred maintenance. The Supreme Court upheld the refiling provision as directly related to the ICC's suspension power. The Court noted that the ICC could simply suspend the originally proposed rates for the full statutory seven-month period but that instead "it pursued a more measured course and offered an alternative tailored far more precisely to the particular circumstances presented." 426 U.S. at 514, 49

L.Ed.2d at 23. *Chessie* establishes the right of the ICC to choose to exercise its suspension power to less than its outer limits in order to meet the needs of a particular situation. The ICC's authorization to file interim rates was the type of "more measured course" or partial waiver which the Supreme Court approved in *Chessie*.

Moss v. *CAB*, 430 F.2d 891 (C.A.D.C.,1970), relied on by the petitioners, is not to the contrary. In *Moss* the Court of Appeals for the District of Columbia held that the Civil Aeronautics Board (CAB) could not, after ex parte meetings with the air carriers, "suggest" a comprehensive rate formula that it would not suspend or investigate. *Moss* involved what for all intents and purposes was the establishment of permanent rates. By attempting to establish a permanent rate structure through its suspension power the CAB took actions which went beyond the strongest action it could have taken under its suspension power, i.e., suspending the proposed increases for 180 days. 49 U.S.C.A. § 1482(g). In essence what the CAB attempted to do in *Moss* was to waive a right it did not have. In contrast, the ICC's suggestion of interim rate ceilings in the present case is an action which is more restrained, or measured, than its right to unconditionally suspend the original tariff for a period of seven months. If in seven months the ICC has not completed its investigation, the carriers will be free to levy their originally filed charges subject to a refund order.

Also, in *Moss* the practical effect of the CAB's actions would have been to immunize the suggested permanent rate structure from judicial review.[14] In the present case the ICC has not sought to shield its final decision from judicial review. Instead the Commission has commenced hearings on the original rates proposed by the petitioners, and any eventual final order stemming from those hearings is subpect to judicial scrutiny.

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[14] Judge Leventhal in his concurring opinion in *Continental Airlines, Inc.* v. *CAB*, 522 F.2d 107 at 131 (C.A.D.C., 1975) (en banc), emphasized the evasion of judicial review as the key to *Moss*.

In a case involving initial rates, if the ICC could not couple its suspension order with a statement of maximum allowable interim ceilings, the Commission would be forced to allow initial rates to go into effect, even if facially outrageous, subject only to lengthy investigation and hearing procedures, or to watch a possibly vital public service close down for want of a rate schedule. We doubt the Congress would have intended that the Commission face that Hobson's choice.

The use of interim rates as a condition to a suspension order is not unprecedented. In I & S Docket No. 8645, Orders (May 27, 1971, and June 29, 1971) the Commission ordered that increased lighterage charged proposed by the Penn Central Railroad be suspended but allowed the company to file interim rates containing additional charges not to exceed 50% of those initially proposed. The ICC's orders also required that Penn Central maintain an account from which refunds could be made to the extent that the proposed tariffs could not be justified to the Commission. In *Port of New York Authority* v. *U.S.*, 451 F.2d 783, 785-88 (CA2, 1971), the Second Circuit held that the Order was unreviewable and that federal courts lacked subject matter jurisdiction over an action challenging the Order.

We conclude that the ICC as corollary to its suspension power had the power to set out allowable rate ceilings for the seven-month period which, if filed, it would not suspend. Therefore, this aspect of its Order is not reviewable by this court.

3. *The refund provisions*

As a condition precedent to the interim rates which the Commission stated it would accept, the Commission required the carriers to establish refund provisions for use in the event that either the interim rates or the originally filed tariffs [15] or both should be found to be excessive.

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[15] As we noted prevously, if the Commission does not complete

With respect to this exercise of power for the seven-month period, like the power to suggest the interim rates themselves, we find this is a valid corollary to the suspension power, which we lack jurisdiction to review. *See Port of New York Authority* v. *U.S., supra.* We are less certain of the Commission's power to require the carriers to establish refund provisions with respect to the originally filed rates. However, we view this exercise of power as corollary to the power to suspend. Thus, insofar as the Commission's order reaches beyond the seven-month period, we are guided by *Chessie,* where the condition upheld by the Supreme Court was permanent.[16]

4. *Arbitrariness and confiscation*

The petitioners assert that the Commission action was an abuse of discretion and that the interim rate ceilings are so grossly insufficient that they are confiscatory in violation of the Fifth Amendment. Restating, we understand these contentions to be that even if the Commission is authorized by § 15(7) to act with respect to the subject matter, its exercise of power departed from constitutional standards. Assuming that we can review the Commission Order through these constitutional entry points the record before us gives no basis upon which we can act.

All motions to intervene are GRANTED. All motions for stay, suspension, injunction and other forms of interlocutory relief are DENIED. The motion of the United States to dismiss the petitions for review is GRANTED.

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its investigation within seven months from the date of its suspension Order, the carriers' originally filed rates automatically go into effect.

[16] Under § 15(7) the Commission may require carriers to keep records and make refunds after the seven-month period has expired. This expressly conferred authority is not what we rely upon—it relates to "a proposed increased rate or charge."

No. 77-2392—Mobil Alaska Pipeline Company v. United States of America and Interstate Commerce Commission

RONEY, Circuit Judge, dissenting:

I respectfully dissent. The thesis of the Commission is that it has the unreviewable authority to suspend the pipeline's initial rate filing and, as an adjunct of that authority, it has the power to fix an unreviewable interim rate for the seven month period. The idea that the Commission can set an unreviewable rate without following the statutory ratemaking procedures runs counter to the entire plan established by Congress in the Interstate Commerce Act.

This is ratemaking. We should not hide from that fact. The Commission candidly admits that it is making an interim rate. To suggest that the rate is "voluntary," that no rate has been set by the Commission because theoretically the pipeline companies could accept the seven month stay and not file for the interim rate, exalts form over substance in a way rarely countenanced by this Court. The Court, the Commission, the pipeline companies, and all parties to this proceeding know that an interim rate will have to be accepted by the respondents. Without a filed tariff, no oil can flow. No one has made the slightest suggestion in brief or oral argument that it would be either in the public or private interest for the transportation of this oil to be suspended for seven months while the Interstate Commerce Commission determines whether or not the proposed tariff is reasonable and just. *See* 43 U.S.C.A. § 1651 (Supp. 1977). We are given to understand that the rate here under consideration does not affect the price of oil at the delivery point, or the eventual price to the consuming public. Any transportation cost adjustment affects only the wellhead price of oil. Although there is almost complete identity between the affiliates which own the pipeline and those who receive the wellhead price, there are some others involved,

and the royalty to the State of Alaska and property owners varies with the wellhead price.

The argument that this is not ratemaking because it is only an interim and not a permanent rate loses force in numbers. The pipeline companies claim the difference between what they should get and what they will get under the interim rate could amount to $340,000,000. This sum is undoubtedly greater than the amount at stake in many permanent rates subject to ICC approval.

Although *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), and *United States* v. *Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669 (1973), are cited for the proposition that the grant or denial of a suspension order is not reviewable, they in fact only hold that a court has no authority at all to suspend a rate and that an ICC refusal to suspend is not reviewable under any statutory standards. They do not hold that a suspension order is unreviewable under constitutional due process standards. I would think that a suspension order in this case, where the lack of any tariff would effectively close down the Alaska Pipeline for seven months, and would eliminate any method of transporting the oil from the Alaska oil fields for that period of time, would be reviewable on a constitutional due process standard.

We are not confronted, however, with just a suspension order. The order before us is schizophrenic. It is both a suspension order *and* a ratemaking order.

This is a situation never previously confronted by the courts. In most situations, if a new rate is submitted to the ICC and the agency chooses to suspend it, this merely means that the carrier involved will continue to charge the rates already in existence. Thus the ICC need not take further action to ensure that the carrier can stay in business and collect charges that at least at one time were assumed to be reasonable, during the seven month period. Here, however, the Commission was faced with a brand new

entity. The Trans-Alaska Pipeline System had no preexisting rate schedule when it filed its "new" rate with the ICC. Thus, after deciding to suspend the filed rate, the ICC was faced with a situation which left no legal rate in effect for the seven month period. Unwilling to allow the pipeline to shut down, the Commission had to promulgate what is a "second" order, a ratemaking order.

Rate setting orders are clearly reviewable under the statute. Therefore I would not review the possible legality of just a suspension order here. I would accept this case for what it is: an attempt by the Commission to do two things, the first of which it would not do had it not the power to do the second. There is no indication in anything before us that the Commission would suspend the proposed tariff if it could not set an interim rate. Thus I would not reach the constitutional considerations that might demand review of a suspension order alone in this unique situation. There is no indication that the Commission would follow such a course. Its claimed authority to do so becomes merely the theoretical exercise of power onto which it hangs its ability to set an interim rate.

So I would assume without deciding that the Commission has the power to suspend the initial rate and go to the question of whether it can set the interim rate in the manner done here. If the interim rate cannot stand, I would send the case back to the Commission for whatever action it wishes to take within the confines of its legal authority. If it chooses to suspend without an interim rate, then on review a court could consider whether that action alone under the circumstances of this case can withstand the due process requirements of the Constitution. Or, if it chooses to arrive at some interim rate through procedures that have some resemblance to the ratemaking procedures which Congress had required, that too could be reviewed. However, I do not think that in order to decide the case before us we need to make any definitive decision as to whether an initial rate

suspension alone, under the facts of this case, would be legal, or whether the Commission can ever set interim rates in connection with a rate suspension. All I would now hold is that the Commission has no authority to do what it did here.

United States v. *Chesapeake & Ohio R.R.*, 426 U.S. 500 (1975), is the only controlling authority relied upon for the proposition that interim ratemaking is a necessary power under the suspension authority. In deciding that interim ratemaking is unreviewable, the majority opinion completely overlooks the fact that the Supreme Court considered the "conditions" imposed on the proposed tariff there to be reviewable.

> In this Court, Chessie has argued that . . . the application of the Commission's action to it is arbitrary and capricious. . . . Since the District Court held that the Commission did not have the power to impose conditions on the refiling of the tariff, it did not address this question. Chessie, if it chooses, may raise the matter on remand in the District Court.

426 U.S. at 515. To distinguish the point on the ground that in *Chessie*, the rate was permanent, must also distinguish the case beyond support for the proposition espoused in the case at bar.

This case is factually and legally different from *Port of New York Authority* v. *United States*, 451 F.2d 783 (2d Cir. 1971), relied upon by the majority. There the initial decision had been made to suspend the effective date of the proposed increase in tariffs. There was a tariff in effect after suspension, one which had already been determined to be reasonable either through Commission action or lack of complaint. The suspension order was concededly within the sole discretion of the Commission, and *all* that was involved was timing. The Commission offered to let the carrier collect an interim increase, if it chose to do so. For two reasons that case is not helpful here.

First, in that case, there was a good faith suspension order of the rate increase which did not cut off services. Here there is *no* indication that the Commission would suspend the tariff and consequently cause a seven month delay in service. In fact, we are told that in oral argument before the Commission, the director of the Commission's Bureau of Investigation and Enforcement indicated the owners of the pipeline might be subject to civil or criminal penalties if they did not file for these "voluntary" interim rates. Such view would dispel any thought that the public interest required a rate suspension. This is pointed out not to suggest that a suspension order would be reviewable under the statutory public interest standard, but only to emphasize that the Commission has made no such decision upon which to hang the *Port of New York Authority* holding.

Second, the pipeline companies' choice is not whether to adhere to present rates for seven months, or accept an interim increase, as was the case in *Port of New York Authority*, but whether to do business at all, or accept an interim rate. This does not make acceptance or rejection of the interim rate the viable choice that was available in that case.

The interim rate being reviewable, the next question is whether it can stand. Even if the Commission is permitted some leeway, and allowance is made for the fact that it "pursued a more measured course and offered an alternative tailored far more precisely (than a simple suspension) to the particular circumstances presented," *Chessie*, 426 U.S. at 514, the manner of arriving at the interim rate was beyond the most liberal reading of its statutory authority.

Congress has set well-established limits on the ICC's power to make rates. First, historically, the ICC did not have ratemaking power. It could set aside a rate as being unreasonable, but the Supreme Court found no implied power to set a reasonable rate. *ICC* v. *Cincinnati, New*

Orleans & Texas Pacific Ry., 167 U.S. 479 (1897). Only nine years later did Congress amend the Act to give the ICC power to set maximum rates, Act of June 29, 1906, ch. 3591, § 4, 34 Stat. 689, and not until 1920 was it given power to set minimum rates, Act. of Feb. 28, 1920, ch. 91, § 418, 41 Stat. 484.

Second, the ICC has the power to set rates *only after* it has determined that a proposed rate is unreasonable. That principle has been reiterated in several cases which indicate that it is the carriers who have the right to propose initial rates. *ICC* v. *Louisville & Nashville R.R.*, 227 U.S. 89 (1913) ("Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order." 227 U.S. at 92). *See also New York* v. *United States*, 331 U.S. 284 (1947); *United States* v. *Illinois Central R.R.*, 263 U.S. 515, 522 (1923); *Southern Pacific Co.* v. *ICC*, 219 U.S. 433 (1911); *ICC* v. *Chicago Great Western Ry.*, 209 U.S. 108, 118-119 (1908).

Third, a proposed rate can be found unreasonable *only after* a full hearing. *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 284 U.S. 248, 262 (1932) ("The legal standards governing the action of the Commission in determining the reasonableness of the rates are unaltered. In the discharge of its duty, a fair hearing is a fundamental requirement.") The courts have consistently held that a finding by the ICC of unreasonableness of the rate proposed by the carrier must be supported by substantial evidence on the record as a whole. *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 806 (1973); *Western Paper Makers' Chemical Co.* v. *United States*, 271 U.S. 268, 271 (1926); *Skinner & Eddy Corp.* v. *United States*, 249

U.S. 557, 562 (1919); *Archer Daniels Midland Co.* v. *United States*, 301 F. Supp. 328 (D. Minn. 1969) (3-judge court); *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 282 F. Supp. 430, 434 (D. Kan. 1968) (3-judge court).

Last, the ICC can establish a rate only after a *full evidentiary hearing. Atchison, Topeka & Santa Fe Ry.* v. *United States*, 284 U.S. 248, 262 (1932); *ICC* v. *Louisville & Nashville R.R.*, 227 U.S. 89, 93 (1913). That hearing requirement is not satisfied by the "brief and informal hearing" which accompanies a suspension order. *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 672 (1963). The case for strict enforcement of the hearing requirement is particularly strong because this rate applies to so few companies, and the administrative inconvenience of multiple parties which sometimes justifies lowered procedural standards is not present. *Compare Londoner* v. *Denver*, 210 U.S. 373 (1908) (individual property assessment without hearing invalid) with *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441 (1915) (city-wide revaluation does not require individual adjudication). Even in the multi-party rate cases, administrative hearings have withstood attack only when the agency granted adequate notice and opportunity to comment both on the original rate proposal and on the comments made by others. *See Shell Oil Co.* v. *FPC*, 520 F.2d 1061, 1074-1076 (5th Cir. 1975), *cert. denied sub nom., California Co.* v. *FPC*, 426 U.S. 941 (1976).

In this case where is the finding of unreasonableness of the proposed rate on an evidentiary record, and where is the record to support the interim rate? The Commission readily admits that it cannot support either finding by record evidence.

But procedural unfairness is only the beginning of the arbitrariness in this case. The real difficulty, and the problem that makes the procedural shortcuts so detrimental to the petitioners, is that Congress through the Act has provided a reasonable way to protect *all* parties in this pro-

ceeding against the effect of error in the proposed rate, but the Commission has, without offer of justification, ignored it in the proposed interim tariff. If the rate is determined to be too high, the carriers may be forced to refund, with interest, 49 U.S.C.A. § 15(7) (Supp. 1977), or pay back as damages, with costs and attorneys' fees, 49 U.S.C.A. § 8, an overcharge collected prior to rate determination. In other words, the parties overcharged can be made whole. If the interim rate is too low, however, the ICC program provides no means whatsoever for the pipeline to recover the difference between what it was required by the Government to charge, and what that same Government later decides would have been a reasonable rate. To have a way to protect all interests, and not take it, and subject one party to the possibility of irreparable loss, is impermissible under even the most deferential standard of judicial review.

The complainants argue that a system of refunds would produce justice at the price of delay. Even justice delayed, however, is preferable to justice forever denied. At oral argument, Commission's counsel suggested no harm had been done because the interim rate is the highest rate that could reasonably be established for the pipeline. That statement constitutes a gross prejudgment of what the ICC will do, and overlooks entirely the reviewable nature of the Commission's ultimate ratemaking action. Without a sufficient record to support a finding of anything at all, and with serious questions about the rate of return, the treatment of inflation, and allowances for depreciation, counsel would have this Court predict what Commissioners, who may not be in office now, will do on the evidence presented them, and what a court of judges, who may not be in office now, will do on review of whatever those Commissioners do.

Nor can this Court sustain the interim rate by obeisance to the expertise of the Commission. Only after a full hearing upon complaint made does the law give weight or significance to the opinion of the Commission. *Atlantic Coast*

Line R.R. v. *ICC*, 194 F. 449 (Commerce Ct. 1911). The expertise of the Commission can only be relied upon after it has exercised its expert judgment on the record before it. *See* Pedersen, *Formal Records & Informal Rulemaking*, 85 Yale L.J. 38 (1975).

Hence I would hold that the Commission had no authority to set in the way it did the interim rate which was forced upon the carriers. I would set aside that proposed interim rate for these reasons: *first*, the Commission did not even attempt to follow congressionally mandated procedures for setting rates; *second*, without some specific finding of unreasonableness in the proposed rate, it appears arbitrary not to follow the statutory plan by which all parties could be protected against any eventual rate determination, and to follow a course which would cause irreparable damage to the pipelines if their position is eventually sustained; *third*, the interim tariff itself appears to be based on a rate of return more akin to that of corporate bonds than to the speculative risks of equity capital, a rate arrived at without sufficient supportive evidence concerning the speculative nature of these investments or the appropriate rate therefor.

I would set aside the Commission's Order of June 28, 1977 and remand the case to the Commission for further consideration consistent with its statutory authority.

APPENDIX B

(Caption Omitted in Printing)

Before Brown, Chief Judge, Godbold and Roney, Circuit Judges.

Judgment

This cause came on to be heard on the petitions of Mobil Alaska Pipeline Company, BP Pipelines Inc., Exxon Pipeline Company and Arco Pipeline Company for review of an order of the Interstate Commerce Commission, and was heard on the motion papers on file;

On consideration whereof, It is now here ordered and adjudged by this Court that the petitions for review of an order of the Interstate Commerce Commission in this cause be, and the same are hereby dismissed. All motions to intervene are GRANTED. All motions for stay, suspension, injunction and other forms of interlocutory relief are DENIED.

July 29, 1977

Issued as Mandate: Sept. 8, 1977

A true copy

Teste: Edward W. Wadsworth
Clerk, U.S. Court of Appeals, Fifth Circuit

/s/ Clare F. Sachs
Sept. 8, 1977

APPENDIX C

June 29, 1977

(SERVICE DATE JUNE 28, 1977)

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 28th day of June, 1977.

INVESTIGATION AND SUSPENSION DOCKET No. 9164

TRANS ALASKA PIPELINE SYSTEM
(Rate Filings)

No. 36611

TRANS ALASKA PIPELINE SYSTEM
(Rules and Regulations)

Initial rate tariffs have been filed by eight pipeline companies, proposing to operate as common carriers of crude petroleum over the Alaska Pipeline System.

Protests and petitions for suspension of the tariffs have been filed by the United States Department of Justice, the State of Alaska, the Arctic Slope Regional Corporation and our Bureau of Investigations and Enforcement. These pleadings seek to invoke our power under section 15(7) of the Interstate Commerce Act (1) to enter upon a hearing concerning the lawfulness of the tariffs and (2) pending the hearing and decision, to suspend the operation of the tariffs for a period no longer than seven months. Replies to the protests have been filed by each of the eight carriers.

The tariffs are identified in Appendix 1 to this order. As noted therein, the various rules contained in the tariffs have already been placed under investigation by Commis-

sion order dated June 17, 1977, No. 36611. Consideration of the tariff rates, however, was deferred to the present order. The rates per barrel proposed by the respective companies are as follows:

Amerada Hess Pipeline Corporation	$6.44
Arco Pipe Line Company	6.04
BP Pipelines Inc.	6.35
Exxon Pipeline Company	6.27
Mobil Alaska Pipeline Company	6.31
Phillips Alaska Pipeline Corporation	6.22
Sohio Pipe Line Company	6.16
Union Alaska Pipeline Company	6.09

With respect to these rates, we have given careful consideration to the protests, and to the carriers' replies. In addition, we have heard oral argument by the parties. It is our conclusion that a formal investigation concerning the lawfulness of the proposed rates should be instituted pursuant to sections 15(1) and 15(7) and that because of the close interrelationship of the rate filings and the applicable rules and regulations, they should be considered in the same proceeding. We further conclude that such rates should be suspended, without prejudice to the filing of interim rates, during the suspension period.

In reaching these conclusions, we have considered the following issues: (1) whether an investigation should be instituted; (2) whether the proposed rates can and should be suspended; (3) whether interim rates can and should be authorized; (4) what level of interim rates should be authorized; and (5) what conditions should be attached to the acceptance of interim rate filings.

The institution of an investigation.

Section 15(7) of the act empowers the Commission to enter upon a hearing concerning the lawfulness of a filed tariff stating a new rate or charge. In order for a rate to

be lawful, a primary requirement is that it be just and reasonable (section 1(5)). The act sets forth other requirements as well, and if an investigation is instituted, any and all aspects of the lawfulness of the rate may be considered. However, the chief question raised by the protests is whether the proposed rates are just and reasonable.

Protestants contend that the filed rates would provide excessive profits, whether compared with a traditional rate of return on valuation or with the carriers' capital costs. They also contend that the cost data provided by the carriers is overstated.

The carriers reply that their rates were computed to allow a 7 percent return on valuation, as contemplated in a 1941 consent agreement between the Justice Department and a number of shipper-owned pipelines (*United States* v. *Atlantic Refining Co.*, C.A. No. 14060, D.D.C. decided December 23, 1941). They also assert that the standards used by protestants are unrealistic in that they do not recognize that the carriers are able to maintain high levels of debt financing only because such debt is guaranteed by the parent oil companies. The carriers argue that, without such guarantees, they would have to resort to a larger amount of equity financing, and their overall capital costs would be higher than the amounts recognized by protestants. The carriers also deny that their cost data is overstated. However, they do not object to a formal investigation of the filed rates.

For reasons set forth below, we do not accept the 1941 consent decree as a standard of reasonableness under the Interstate Commerce Act. Moreover, while there may be merit to the carriers' contentions that the standards used by protestants do not cover their true costs of capital, this is a matter that cannot be resolved until a more complete record is developed. Finally, evidentiary hearings will be necessary to develop acceptable cost data for use in applying whatever measures of reasonableness are found to be

appropriate. Therefore, we conclude that there has been a sufficient showing of probable unlawfulness to warrant the institution of a formal investigation concerning the proposed rates.

The suspension of the proposed rates. Some of the carriers argue that the Commission is without power to suspend initial rates. They rely on numerous references in legislative history and past cases to exercise of the suspension power in instances of "increased" rates. They rely on such references to conclude that the power of suspension does not apply to initial rates. However, the reason that the suspension powers are usually discussed in the context of increased rates is clear: the vast majority of rate proceedings involve situations where increases in existing rates are at issue.

We see no basis in the sources cited for concluding that we may not suspend initial rates. If this were the Congressional intention, we believe that it would have been explicitly stated. It was not so stated, and the carriers have been unable to cite any direct authority for their position.

It is stated in section 15(7) that the Commission is authorized to enter upon a hearing concerning "any schedule stating a new individual or joint rate, fare, or charge." Pending this hearing and decision, the Commission may suspend, for up to seven months, the schedule being investigated. In *Rail-Water, Grain in Bulk, Mo., Ill., and Ind., to Buffalo,* 321 I.C.C. 564, 566 (1963), it was said that the term "new rate" in section 15(7) encompasses "both changed and initial" rates.

Similar suspension powers pertaining to other modes of carriage are contained in sections 216(g), 218(c), 307(g), and 406(e) of the act. In each of these sections, there is "grandfather" language making the provisions inapplicable to "initial" rates filed on or before a certain date. By implication, then, the investigation and suspension provisions *are* applicable to initial rates filed after such date.

As noted, if it were intended to exclude initial rates from the suspension power of section 15(7), one would expect specific language to this effect. No such language appears. Accordingly, we have no doubt that the suspension power is applicable to initial rates.

The carriers also question whether, even if the suspension power is applicable, we should exercise it here. They argue that protestants would not be harmed by allowing the proposed rates to go into effect, inasmuch as refunds or reparations would be available if the investigation should show that the filed rates are too high.

Protestants, however, do not consider the possibility of refunds to be adequate protection. The Arctic Slope Regional Corporation, which represents Alaskan Natives, notes that the longer it must wait for its share of royalty revenues (which are adversely affected by high transportation rates), the less value such revenues will have. Protestants also argue that the maintenance of pipeline rates at too high a level would act as a deterrent to the use of the pipeline by independent oil producers.

Although we recognize that the refund remedy is available, we do not believe that the rates can be allowed to go into effect without suspension, when, as here, the protestants have made a showing or [sic] probable unlawfulness. Moreover, as noted by protestants, the maintenance of excessively high rates could act as an obstacle to the use of the pipeline by non-affiliated oil producers, and would also delay the Alaskan interests in obtaining revenues that depend upon the wellhead price of the oil. Under the circumstances, we have concluded that the proposed rates, as filed, should be suspended, pending our investigation, for the statutory period of 7 months.

The authorization of interim rates. Protestants seek to have the Commission name specific rates that may be charged by each carrier while the investigation is being

conducted. The carriers, however, contend that the Commission has no power to do so. They argue that the specification of interim rates would be a rate prescription within the meaning of section 15(1) of the act, and that we are empowered to take such action only after a full hearing.

We see no basis for considering such action to be a prescription of rates.[1] We may authorize interim rates without requiring that the rates proposed in the tariffs be cancelled, and without precluding the proposed rates from taking effect at the end of the 7-month suspension period if our investigation is not then completed (subject, however, to a refund provision as hereafter described). These interim rates would not be intended to have permanent effect, but would merely be interim rates that we would allow to be collected during the suspension period. Such rates, if filed, remain subject to Commission scrutiny and are not to be considered as prescribed within the meaning of the decision in *Arizona Grocery* v. *Atchison, T. & S.F. Ry., Co.*, 284 U.S. 370.

We believe that the power to allow interim rates is inherent in the suspension power. Without it, the Commission could be faced with the choice of allowing the carriers to operate at any rate they choose, whether or not lawful, or precluding carrier operations altogether. We do not believe

[1] *Moss* v. *C.A.B.*, 430 F. 2d 891, is clearly distinguishable. That case involved ex parte meetings and the substitution by the Board of "a complete and innovative scheme for setting all passenger rates for the Continental United States," with an indication that such a filing would not be suspended. In *Moss*, the court noted that unlike the Interstate Commerce Act, the Federal Aviation Act has no provision for reparations, thus rendering the procedural safeguards of the Aviation Act the public's sole defense. The court also pointed out its view might have been different if interim action were involved. In the present TAPS proceedng, both the proposed rates and any interim rates which may be filed *will* remain subject to full investigation. See also *Consolidated Edison Co. of New York* v. *F.P.C.*, 512 F. 2d 1332, 1340, distinguishing *Moss* v. *C.A.B.* and stressing the behind-the-scenes aspect of the *Moss* case.

that Congress could have intended our powers to be so inflexible. If the suspension power did not include the discretion to permit interim rates, it would be a substantially less satisfactory tool for serving the public interest.

Having concluded that we possess the power to authorize interim rates, we have no hesitation about taking such action in the present circumstances. If we were to suspend the proposed rates without allowing interim rates, the result would be to preclude the carriers from commencing their operations during the suspension period. Such a result would be contrary to the interests of all concerned.

The level of interim rates. We believe that the proper question to be asked concerning our action in these proceedings is not whether we have the discretion to authorize an interim rate. Rather, the question should be whether we have exercised such discretion in a reasonable manner.

The key to a proper exercise of our discretion in this situation lies in recognizing the possible consequences of our action. We must bear in mind that the carriers may have no means of obtaining restitution if initially required to maintain too low a rate. On the other hand, a remedy by way of refunds or reparations is available to persons injured by the charging of a rate that is ultimately found to be too high. In these circumstances, the reasonable approach to determining an interim rate is (1) to accept the basic data supplied by the carriers and (2) at the same time to require a refund provision in the event that such amounts are ultimately determined to exceed a reasonable level. This, then, is the course that we shall follow.

The process of arriving at an acceptable interim rate requires two steps. The first is to define the basic carrier data that will be employed, and the second is to perform computations using such data.

The data that we will employ is set forth in Appendix 2. For the purposes of the present decision, we have, for the

most part, employed the figures supplied by the carriers. Appendix 2 displays this data both in total dollars and in dollars per barrel. The conversion to per-barrel figures is based on the assumption that the normal traffic volume for the beginning years will be 438 million barrels a year (1.2 million barrels a day), and that this number of barrels will be apportioned among the carriers according to their respective ownership shares in the pipeline.

Of the items set forth in Appendix 2, substantial questions have been raised at this stage of the proceeding particularly with regard to removal and restoration costs and depreciation. Removal costs are the costs expected to be incurred at the end of the useful life of the pipeline in order to meet environmental requirements. According to the Alyeska Pipeline Service Company, these costs will amount to about $1.049 billion in 1977 dollars. Some of the carriers propose to simply set aside one twenty-fifth of their total share of this amount each year for 25 years. Others propose more detailed computations to inflate the removal costs to dollar costs for the year 2002, and to allow for compounded interest on the yearly accruals. The protestants, on the other hand, seek to reduce the yearly removal charges by requiring that they be amortized over a period longer than 25 years.

With respect to depreciation charges, the carriers uniformly propose a 25-year service life, on the basis that known recoverable reserves on the North Slope are expected to be depleted in terms of economic recovery in 25 years. Protestants propose that service lives as long as 35 years be required, on the basis that additional oil fields exist on the North Slope that are likely to extend the pipeline's useful life and that even the present reserve may have a longer life than 25 years.[3]

[3] It should be noted that at oral argument several protestants did not dispute the use of 25 years at the suspension level.

Both of these issues will receive substantial attention during our formal investigation. However, at this stage of the proceedings, the data presented concerning additional reserves is of a somewhat uncertain nature. We do not deem this data sufficient to warrant a reduction in the amount allowed for depreciation for the purposes of determining the lawfulness of the proposed rates at the suspension level. By the same token, we will not, at this time, compute removal charges over an amortization period of more than 25 years.

For removal costs, we have used the same per-barrel allowance for each carrier, because we see no basis for cost differences among the carriers on this item. Our allowance is based on a simple amortization without inflation or discounting. While this approach may somewhat understate the amounts that need to be accrued, the magnitude of the discrepancy would not be great in terms of the overall tariff computation. It may well be outweighed by overstatement in the depreciation charges.

An additional issue is raised by protestants concerning the investment and valuation figures. It is their contention that these figures are affected by excessive construction costs. Needless to say, this issue will be a major focus of our formal investigation. However, as the protestants themselves concede, this is not a matter that can be properly dealt with at the present stage of the proceeding. Accordingly, the investment figures provided by the carriers will be used at this time. Our valuation staff has used the same data in providing valuation figures for present purposes.

In one aspect, the investment data shown on Appendix 2 differs from figures supplied by certain carriers in that it does not include an amount for working capital. Not all of the carriers reported working capital as part of their investment. Those that did appear to have used no consistent standard. For this reason, and because a satisfactory basis for judging the carriers' working capital needs has not been

shown, we have omitted it from the investment figures.[3] We believe that our action in this respect is more than compensated by our liberality in not averaging down the investment figures for depreciation over the first few years.

Having the basic data at hand, we turn now to the question of rate computation.

In justifying the filed tariff rates, the carriers contend that the proposed rates are merely sufficient to cover expenses and interest and to allow an after-tax return on equity equal to 7 percent of their valuation. They consider this method of gauging a return on equity to be permissible since it is used in the 1941 consent agreement between the Justice Department and a large number of shipper-owned pipelines.

However, the consent decree standard has never been employed in a Commission proceeding as the test of reasonableness of rates. Its sole legal status is as a limit on the amount of dividends that pipelines may pay to shipper owners without risking prosecution under the Elkins Act for illegal rebates. Moreover, as a standard of reasonableness, it has nothing to recommend it from a conceptual standpoint. Although valuation is a measure of the entire investment, the consent decree standard allows a return on valuation to be used entirely to compensate one segment of the capital invested. Such a standard can have no relationship, except by coincidence, to the carriers' true capital costs. As shown in Appendix 3, the filed rates would produce returns on equity ranging from 31 percent to 96 percent. Even if the carriers had a lower capital structure of 60 percent debt and 40 percent equity, the proposed rates would provide returns on equity ranging between 16.8 percent and 20.6 percent. The Department of Justice suggests 14 percent as a suitable number for use as the cost of equity

[3] An allowance for working capital has, however, been included in the staff evaluation estimates reflected in Appendix 2.

capital at this stage of the proceeding. We agree that this would be a suitable figure for present purposes. Accordingly, it can be seen that the filed tariff rates would produce returns exceeding capital costs, even where the carriers' own expense and investment data are accepted.

Inasmuch as the carriers' justification does not appear satisfactory, we must next consider what standards would be appropriate based on our own precedents. As we noted in No. 35533, *Petroleum Products, Williams Brothers Pipe Line Company,* —— *I.C.C.* —— (1976), the standards we have applied in the past have been an 8 percent return on valuation for crude oil pipelines and 10 percent on valuation for petroleum products pipelines.

At the outset, we have questions about the appropriateness of an 8 percent return in this instance, where annual interest rates generally exceed 8 percent. The small margin of earnings in excess of interest that would result is demonstrated in Appendix 4. As may be seen, rates computed on this basis would range from $3.74 for BP to $4.16 for Exxon. Further study of this table shows that five of the eight carriers would have returns on equity of 10 percent or less under this standard, and returns for some would be lower than 3 percent. Such a return would be unreasonably low.

It should be noted that the 8 percent on valuation standard arose in the early 1940's, when capital costs were substantially lower than they are today. It could continue to provide a substantial return on original investment to established carriers, whose valuations have risen well above their actual investment because of inflation. In the case of the TAPS carriers, however, their property was constructed so recently that valuation is little higher than actual cost, and an 8 percent return on valuation becomes quite deficient.

The question arises, then, as to whether the Commission can permissibly depart from its previous standards in these

proceedings. The answer lies in the fact that, whatever standards we use, the earnings allowed to the carriers must comply with governing judicial requirements. The controlling standard, set forth in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944), is that a regulated firm must be allowed enough revenue not only for operating expenses, but also for the capital costs of the business. Such revenue most cover service on the debt and a return on equity sufficient to attract capital. [See also section 15a(2).]

For the purposes of the present decision, we have determined that the standard of a 10 percent return on valuation for petroleum products pipelines is appropriate for the TAPS carriers. Our selection of the 10 percent return on valuation standard is based primarily on two factors. One is that the magnitude and inherent attributes of the TAPS project produce a higher risk factor than is normal in crude oil pipeline operations. Many of the construction features are being tested for the first time. Geographic terrain, environmental and temperature problems, possible earthquakes, vulnerability to sabotage, future oil pricing policies, and regulatory uncertainty are among the factors to be considered. Moreover, a 10 percent return on valuation appears generally sufficient to cover estimated capital costs. As previously noted, an 8 percent return on valuation produces generally insufficient returns on equity.

As shown in Appendix 5, a 10 percent return on valuation produces for the individual carriers on their actual capital structure returns on equity ranging from 13.3 percent to 54.3 percent, with no figure for Mobil which claims to be totally debt financed. The composite return on equity is 23 percent.

While these returns on equity have been challenged by protestants, the carriers note that they have an abnormally high proportion of debt in their capital structures, which is made possible by the fact that their debt obligations are

unconditionally guaranteed by their parent oil companies. The carriers would argue that tariff rates based on 10 percent return on valuation provide a much lower return on equity with a more normal capital structure.

Although the 10 percent return on valuation appears suitable for present purposes, we stress that it is not intended to be a general standard nor to be a prejudgment of criteria to be used upon the conclusion of the investigation in these proceedings, nor is it in any way to be considered a prejudgment of the issues in Ex Parte No. 308.

Conditions for the acceptance of interim rate filings. The Bureau of Investigations and Enforcement asks that the carriers be required to produce a number of types of documents as a condition to our acceptance of interim rates. The carriers, however, contend that BIE's proposed condition is an attempt to circumvent the Commission's established discovery rules, and should not be adopted.

We have concluded not to impose the requested condition in the present order. We do not believe that such orders are a necessary subject for inclusion in an order disposing of petitions for suspension of a tariff. Any future request for orders can be handled as separate matters later, when all factors concerning the production of the requested data can be properly considered. In addition, we note that at oral argument, the carriers indicated their willingness to cooperate in the production of documents. We shall expect them to abide by this agreement.

The other condition requested by protestants pertains to possible refunds of excess charges collected under the interim rate. We recognize that even the lower interim rate levels may prove upon investigation to exceed reasonable levels. Therefore, as a condition to filing such interim rates, we will require that the carriers keep account of the amounts collected, and that they agree to refund any portion of such amounts that may ultimately be established as excessive.

Immediately prior to the oral argument on June 27, 1977, the Department of Justice filed a memorandum in reply to the responses of the carriers together with a motion for leave to file. Neither the special procedure adopted in this case nor our rules of practice contemplate replies to replies and the motion for leave to file is denied.

In the paragraphs below, the tariffs of Phillips Alaska Pipeline Corporation are not included. As noted in Appendix 1, a separate order with respect to Phillips will be issued before July 20, 1977.

Is it ordered, That the operation of the schedules authorized below be, and it is hereby, suspended, and that the use thereof in interstate or foreign commerce be deferred from June 30, 1977, and to and including January 29, 1978, except as to I.C.C. 2, published by Amerada Hess, which bears a July 1 effective date and the operation of which is suspended to January 31, 1978, unless otherwise ordered by this Commission;

I&S No. 9164

AMERADA HESS PIPELINE CORPORATION
I.C.C. No. 2

ARCO PIPE LINE COMPANY
I.C.C. No. 1030
on page 14, the rate of $6.04

BP PIPELINES, INC.
I.C.C. No. 2

EXXON PIPELINE COMPANY
I.C.C. No. 125

MOBIL ALASKA PIPELINE COMPANY
I.C.C. No. 2

SOHIO PIPE LINE COMPANY
I.C.C. No. 742
on the title page, the rate of $6.16

UNION ALASKA PIPELINE COMPANY
I.C.C. No. 2

IT IS FURTHER ORDERED, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates contained in the suspended schedules, as aforesaid, as well as the interim schedules authorized to be filed, pursuant to section 15(1) and section 15(7), with a view to making such findings and orders in the premises as the facts and circumstances shall warrant. In the event the schedules here under investigation are changed, amended or reissued, upon termination of the suspension period and the investigation not having been concluded, such changed, amended or reissued schedules will be included in this investigation.

IT IS FURTHER ORDERED, That the investigation in this proceeding shall include all matters and issues with respect to the lawfulness of the said rates under the Interstate Commerce Act.

IT IS FURTHER ORDERED, That the named carriers be, and they are hereby, authorized to file, upon not less than one day's notice, interim rates not exceeding the following amounts:

Amerada Hess Pipeline Corporation	$4.85
Arco Pipe Line Company	4.91
BP Pipelines Inc.	4.68
Exxon Pipeline Company	5.10
Mobil Alaska Pipeline Company	4.84
Sohio Pipe Line Company	4.70
Union Alaska Pipeline Company	4.89

subject, however, to the condition that (1) the interim tariffs contain a refund provision to the effect that if the

rates charged exceed the rates subsequently authorized or prescribed by the Interstate Commerce Commission, the carriers will refund the difference between the rates charged and any rates which may subsequently be authorized or prescribed by the Interstate Commerce Commission with interest computed in accordance with section 15(8)(e) of the act, added by the Railroad Revitalization and Regulatory Reform Act of 1976; and (2) that the carriers file (effective on not less than 1 days [sic] notice) a similar refund provision applicable to the original proposed rates. Although that section does not apply to pipelines, it represents the latest expression of Congressional interest, and the Commission's notice of April 14, 1977 indicated its applicability to all carriers under Part I. It should also be noted that the carriers at the oral argument expressed assent to an even higher rate of interest in the event of an investigation without suspension. Under the circumstances, we believe interest computed in accordance with section 15(8)(e) would be fair to all parties.

AND IT IS FURTHER ORDERED, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be served upon the carriers parties to the said schedules, and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission. (Commissioner Brown approves the order except insofar as it denies the motion of the Department of Justice for leave to file a response to the carrier's responses).

(SEAL)

H. G. HOMME, JR.,
Acting Secretary.

I&S No. 9164

Appendix 1

INITIAL TARIFFS APPLICABLE TO THE TRANS ALASKA PIPELINE SYSTEM

Carrier	*Tariff No.*	*Filing Date*	*Effective Date*
Amerada Hess Pipeline Corporation	I.C.C. No. 1 (rules)	June 1, 1977	July 1, 1977
	I.C.C. No. 2 (rate)	June 1, 1977	July 1, 1977
Arco Pipeline Company	I.C.C. No. 1030	May 27, 1977	June 30, 1977
BP Pipelines, Inc.	I.C.C. No. 1 (rules)	June 3, 1977	June 20, 1977
	I.C.C. No. 2 (rate)	June 3, 1977	June 30, 1977 [1]
Exxon Pipeline Company	I.C.C. No. 124 (rules)	June 8, 1977	June 20, 1977
	I.C.C. No. 125 (rate)	June 8, 1977	June 30, 1977
Mobil Alaska Pipeline Company	I.C.C. No. 1 (rules)	June 10, 1977	June 20, 1977
	I.C.C. No. 2 (rate)	June 10, 1977	June 30, 1977 [1]
Phillips Alaska Pipeline Corporation	I.C.C. No. 1 (rules)	June 20, 1977	July 20, 1977 [2]
	I.C.C. No. 2 (rate)	June 20, 1977	July 20, 1977 [2]
Sohio Pipeline Company	I.C.C. No. 742	June 3, 1977	July 30, 1977 [1]
Union Alaska Pipeline Company	I.C.C. No. 1 (rules)	June 15, 1977	June 30, 1977
	I.C.C. No. 2 (rate)	June 15, 1977	June 30, 1977

Tariff rules filed by all of the named carriers except Phillips were placed under investigation in No. 36611 by order of the Commission served June 17, 1977. Consideration of the rates filed by those carriers was deferred to the present order.

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[1] Postponed from June 20, 1977.

[2] Because of the later effective date of these tariffs, the time for filing protests and replies to them has not yet expired. The question of their suspension or investigation will be the subject of a separate order by the Commission, to be issued prior to July 20, 1977.

BASIC CARRIER DATA
(000 omitted)

		AM. HESS	ARCO	BP	EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Operating Costs	Total	6,500[1]	90,250[1]	64,757[1]	81,900[1]	19,699[1]	6,139[1]	135,200[1]	6,499[1]	410,944
	Per Barrel	.989	.981	.933	.935	.899	.844	.926	.894	.938
Removal Costs	Total	629[2]	8,812[2]	6,646[2]	8,392[2]	2,098[2]	697[2]	13,989[2]	697[2]	41,960
	Per Barrel	.096	.096	.096	.096	.096	.096	.096	.096	.096
Investment	Total	144,031[3]	1,931,850[3]	1,467,240[3]	1,837,000[3]	459,500[3]	147,369[3]	3,138,500[3]	142,985[3]	9,268,475
	Per Barrel	21.923	21.003	21.148	20.970	20.982	20.268	21.492	19.665	21.161
Depreciation	Total	5,754[4]	77,247[4]	59,794[4]	73,700[4]	18,080[4]	6,061[4]	126,200[4]	5,750[4]	372,586
	Per Barrel	.876	.840	.862	.841	.826	.834	.864	.791	.851
Debt	Total	116,957[5]	1,814,887[5]	1,255,947[5]	1,431,250[5]	459,500[5]	120,000[5]	2,707,500[5]	128,439[5]	8,034,480
	Per Barrel	17.802	19.731	18.103	16.338	20.982	16.504	18.541	17.665	18.344

BASIC CARRIER DATA (Continued)

Interest	Total	11,288[6]	140,200[6]	118,889[6]	114,500[6]	32,674[6]	10,125[6]	252,480[6]	9,369[6]	689,525
	Per Barrel	1.718	1.524	1.714	1.307	1.492	1.393	1.729	1.289	1.574
Interest Rate		9.651%[7]	7.725%[7]	9.466%[7]	8.000%[7]	7.111%[7]	8.438%[7]	9.325%[7]	7.295%[7]	8.582%
Equity	Total	27,074[8]	116,963[8]	211,293[8]	405,750[8]	—0—[8]	27,369[8]	431,000[8]	14,546[8]	1,233,995
	Per Barrel	4.121	1.272	3.045	4.632	—0—	3.764	2.951	2.001	2.817
Valuation	Total	148,900[9]	2,036,000[9]	1,541,200[9]	1,937,500[9]	484,500[9]	158,200[9]	3,271,400[9]	155,900[9]	9,733,600
	Per Barrel	22.664	22.135	22.214	22.118	22.123	21.758	22.402	21.441	22.223
Debt/ Equity		81.2/18.8	93.9/6.1	85.6/14.4	77.9/22.1	100.0/0.0	81.4/18.6	86.3/13.7	89.8/10.2	86.7/13.3

FOOTNOTES TO BASIC CARRIER DATA

Amerada Hess

1. Reported in undated statement submitted by Amerada Hess entitled "General Assumptions for Calculating TAPS Tariff as of May, 1977."
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Amerada Hess' ownership share (1.50 percent).
3. Amerada Hess' share (1.50 percent) of Alyeska investment ($7,959 million for facilities plus $16 million for land), plus Amerada Hess' capitalized construction interest ($22,670,500) and capitalized overhead costs ($1,735,400) as reported by letter from R.K. Stafford dated May 13, 1977.
4. Reported in letter from R. K. Stafford dated June 1, 1977.
5. Reported in "General Assumptions" statement.
6. Reported in "General Assumptions" statement.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Arco

1. Reported in letter from J.D. Wessling dated June 1, 1977.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Arco's ownership share (21 percent).
3. Arco's share (21 percent) of Alyeska investment ($7,959 million for facilities, plus $16 million for land), plus Arco's capitalized construction interest ($257,100,000),

as reported in letter from J.D. Wessling dated June 1, 1977.

4. Reported in letter dated June 1, 1977.
5. Interest divided by interest rate.
6. Reported in June 1, 1977 letter.
7. Weighted average interest rate of debt issues shown in a letter from J.D. Wessling dated June 2, 1977.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

BP

1. Reported in BP's submission of June 15, 1977, in explanation of filed tariff rates.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by BP's ownership share (15.84 percent).
3. BP's share (15.84 percent) of Alyeska investment ($7,959 million for facilities plus $16 million for land), plus BP's capitalized construction interest and overhead costs ($204 million), with the latter as reported in BP's submission of June 15, 1977.
4. Reported in BP's submission of June 15, 1977.
5. Investment less equity.
6. Reported in a letter from P.H. Jones dated May 27, 1977.
7. Interest divided by debt.
8. Reported in a letter from P.H. Jones dated June 14, 1977.
9. Staff estimate based on reported investment figures.

Exxon

1. Reported in Appendix A to Exxon's reply to protests.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Exxon's ownership share (20 percent).
3. Exxon's share (20 percent) of Alyeska investment ($7,959 million for facilities, plus $16 million for land), plus Exxon's capitalized construction interest ($242 million), with the latter as reported in a letter from J.D. Sturtevant dated March 21, 1977.
4. Reported in a letter from J.D. Sturtevant dated June 1, 1977.
5. Interest divided by interest rate.
6. Reported in Appendix A to Exxon's reply to protests.
7. Reported in Appendix A to Exxon's reply to protests.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Mobil

1. Reported in a letter from C.R. Thompson dated May 27, 1977.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Mobil's ownership share (5 percent).
3. Mobil's investment, including capitalized construction interest ($57.7 million) and capitalized overhead costs ($3.2 million) as reported in a letter from C.R. Thompson dated April 29, 1977.
4. Reported in letter dated May 27, 1977.
5. Debt presumed to be 100 percent of investment. Data filed by Mobil gives no indication of equity financing.

6. Reported in letter dated May 27, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Phillips

1. Reported in a letter from James Mullen dated July [sic; June] 20, 1977.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Phillips' ownership share (1.66 percent).
3. Phillips' share (1.66 percent) of Alyeska investment ($7,959 million for facilities plus $16 million for land), plus Phillips' capitalized construction interest ($14,944,000) and capitalized overhead costs ($40,000), with the latter items as reported in letter of June 20, 1977. Working capital ($1,480,000) excluded.
4. Reported in undated statement entitled "Phillips Petroleum Company—Estimate of Expenses."
5. Reported in letter of June 20, 1977.
6. Reported in letter of June 20, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Sohio

1. Reported in a letter from J.T. Boltacz dated June 13, 1977.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Sohio's ownership share (33.34 percent).

3. Sohio's investment (3,138.5 million) as reported in letter dated June 13, 1977. Working capital ($13 million) excluded. Subtracting Sohio's share of Alyeska investment would indicate $479,635,000 as capitalized construction interest and overhead costs.
4. Reported in letter dated June 13, 1977.
5. Reported in letter dated June 13, 1977.
6. Reported in letter dated June 13, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Union

1. Reported in a letter dated May 27, 1977, from E.J. Takach.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Union's ownership share (1.66 percent).
3. Union's share (1.66 percent) of Alyeska investment ($7,975 for facilities plus $16 million for land), plus Union's capitalized construction interest ($10.6 million), with the latter as reported in a letter from David M. Schwartz dated June 14, 1977.
4. Reported in letter dated May 27, 1977.
5. Reported in letter dated June 14, 1977.
6. Computed from debt description in letter dated June 14, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Appendix 3

EFFECTS OF FILED TARIFF RATES

I&S No. 9164

	AMERADA HESS	ARCO	BP	EXXON	MOBIL
Revenue (Rate)	6.440	6.040	6.350	6.270	6.310
Less:					
Operating	.989	.981	.933	.935	.899
Depreciation	.876	.840	.862	.841	.826
Removal Costs	.096	.096	.096	.096	.096
Less Interest	1.718	1.524	1.714	1.307	1.492
Less Taxes	1.461	1.375	1.452	1.635	1.585
Return on Equity	1.300	1.224	1.293	1.456	1.412
Percentage Returns:					
On Equity	31.5%	96.2%	42.5%	31.4%	(no equity)
On Total Investment	13.8%	13.1%	14.2%	13.2%	13.8%
On Valuation	13.3%	12.4%	13.5%	12.5%	13.1%

	PHILLIPS	SOHIO	UNION	TOTAL
Revenue (Rate)	6.220	6.160	6.090	6.211
Less:				
Operating Costs	.844	.926	.894	.938
Depreciation	.834	.864	.791	.851
Removal Costs	.096	.096	.096	.096
Less Interest	1.393	1.729	1.289	1.574
Less Taxes	1.615	1.346	1.598	1.456
Return on Equity	1.438	1.199	1.422	1.296
Percentage Returns:				
On Equity	38.2%	40.6%	71.1%	46.0%
On Total Investment	14.0%	13.6%	13.8%	13.6%
On Valuation	13.0%	13.1%	12.7%	12.9%

Appendix 4

TARIFF COMPUTATION

Allowing 8 Percent Return on Valuation—Actual Capital Structure

	AM HESS	ARCO	BP	EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Revenue (RATE)	3.881	3.965	3.739	4.160	3.903	3.905	3.749	3.975	3.892
Less:									
Operating Cost	.989	.981	.933	.935	.899	.844	.926	.894	.938
Depreciation	.876	.840	.862	.841	.826	.834	.864	.791	.851
Removal Costs	.096	.096	.096	.096	.096	.096	.096	.096	.096
Less Interest	1.718	1.524	1.714	1.307	1.492	1.393	1.729	1.289	1.574
Less Tax	.107	.277	.071	.519	.312	.390	.071	.479	.229
Return on Equity	.095	.247	.063	.462	.278	.348	.063	.426	.204
Percentage Returns:									
On Equity	2.3%	19.4%	2.1%	10.0%	(no equity)	9.2%	2.1%	21.3%	7.2%
On Total Investment	8.3%	8.4%	8.4%	8.4%	8.4%	8.6%	8.3%	8.7%	8.4%
On Valuation	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%

Appendix 5

TARIFF COMPUTATION

Allowing 10 Percent Return on Valuation—Actual Capital Structure

	AM. HESS	ARCO	BP	EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Revenue (Rate)	4.847	4.906	4.681	5.100	4.842	4.829	4.700	4.885	4.835
Less:									
Operating Costs	989.	.981	.933	.935	.899	.844	.926	.894	.938
Depreciation	.876	.840	.862	.841	.826	.834	.864	.791	.851
Removal Costs	.096	.096	.096	.096	.096	.096	.096	.096	.096
Less Interest	1.718	1.524	1.714	1.307	1.492	1.393	1.729	1.289	1.574
Less Taxes	.616	.775	.569	1.016	.809	.879	.574	.960	.728
Return on Equity	.548	.690	.507	.905	.720	.783	.511	.855	.648
Percentage Returns:									
On Equity	13.30%	54.25%	16.65%	19.54%	(no equity)	20.80%	17.32%	42.73%	23.00%
On Total Investment	10.34%	10.54%	10.50%	10.55%	10.54%	10.74%	10.42%	10.90%	10.50%
On Valuation	10%	10%	10%	10%	10%	10%	10%	10%	10%

APPENDIX D

INTERSTATE COMMERCE COMMISSION
Washington, D. C. 20423

(SERVICE DATE JUNE 29, 1977)

INVESTIGATION AND SUSPENSION DOCKET No. 9164
TRANS ALASKA PIPELINE SYSTEM
(Rate Filings)

NO. 36611

TRANS ALASKA PIPELINE SYSTEM
(Rules and Regulations)

June 29, 1977

CORRECTION NOTICE:

The order served in these proceedings on June 28, 1977, contained certain inadvertent omissions and typographical errors. Corrections should be made as follows:

Page 1

First sentence of text—add "Trans" before "Alaska Pipeline System."

Page 2

First paragraph, last sentence—delete, and substitute the following: "However, the question raised by the protests is whether there is reason to believe the proposed rates are not just and reasonable."

Page 3

Next-to-last paragraph, fifth line—after "could act as" insert "a deterrent or".

Page 6

Last paragraph, lines 12 through 18—Delete the three sentences beginning "Even if the carriers . . ." and ending ". . . for present purposes."

Page 8

Fifth paragraph, second line—delete "under the interim rate."

Fifth paragraph, sixth line—after "amounts collected" insert "under the interim rates or the proposed rates should they become effective".

Page 9

Third further ordering paragraph, line 11—change to read: "subject however, to the condition that the carriers keep account and that (1) the interim tariffs contain".

Appendix 1

Opposite Sohio Pipeline Company, change Effective Date to "June 30, 1977".

H. G. Homme, Jr.
Acting Secretary

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2412

BP Pipelines Inc., *Petitioner,*
v.
United States of America and the
Interstate Commerce Commission, *Respondents*

(Filed September 8, 1977)

Petition For Review Of An Order Of The Interstate Commerce Commission

Before Brown, Chief Judge, and Roney, Circuit Judge*.

By the Court:

BP Pipelines Inc. has petitioned for rehearing of our July 29, 1977 decision in Mobil Alaska Pipeline Co. v. United States, etc. [Nos. 77-2392, 77-2412, 77-2421 and 77-2437 at 5208]. We believe that the petition presents substantially nothing that the panel did not pass on in its prior decision. In view of the severe time problems involved in the operation of the Trans Alaska Pipeline and the parties' need to expedite Supreme Court review, the Court is of the opinion that nothing further would be accomplished by rehearing.

Therefore, to enable the parties to seek review before the Supreme Court without further delay, it is ordered that BP's Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the Petition for Rehearing En Banc is Denied.

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* Judge Godbold, a member of the panel, being absent from the United States, did not participate in this Order.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2421

EXXON PIPELINE COMPANY, *Petitioner*,
v.
UNITED STATES OF AMERICA and the
INTERSTATE COMMERCE COMMISSION, *Respondents*

(FILED SEPTEMBER 8, 1977)

Petition For Review Of An Order Of The Interstate Commerce Commission

Before BROWN, Chief Judge, and RONEY, Circuit Judge*.

BY THE COURT:

Exxon Pipeline Company has moved for a stay of the mandate of this Court pending its application for a writ of certiorari to the Supreme Court for review of our decision of July 29, 1977 in Mobil Alaska Pipeline Co. v. United States, etc. [Nos. 77-2392, 77-2412, 77-2421 and 77-2437 at 5208]. Such a stay is unnecessary for timely petition for certiorari. Therefore, it is ordered that Exxon's motion for a stay of mandate is DENIED.

Exxon additionally has moved for a stay of the June 28, 1977 Interstate Commerce Commission Order pending application to the Supreme Court for a writ of certiorari for review of our July 29, 1977 decision. This motion seeks essentially the same relief previously sought before this panel as to which this Court has ruled on the merits. Because of the action of the panel, and for the reasons stated in the majority opinion, Exxon's motion for stay of the ICC order is also DENIED.

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* Judge Godbold, a member of the panel, being absent from the United States, did not participate in this Order.

APPENDIX G

INTERSTATE COMMERCE COMMISSION
Washington, D. C. 20423

(SERVICE DATE JUNE 13, 1977)

June 13, 1977

Supplemental Notice Concerning Filing of Protests and Replies To Initial Tariffs for the Trans-Alaska Pipeline System

SUBJECT: Revised schedule for filing of protests and replies; oral argument.

The effective dates of tariffs filed by Sohio Pipe Line Company, BP Pipelines Inc., and Mobil Alaska Pipeline Company have been postponed from June 20, 1977, to June 30, 1977. In view of these postponements, and in order to allow more time for preparation of protests and replies, the filing dates set forth in the Commission's notice of June 8, 1977, are hereby modified, and that notice should be disregarded.

It is now requested that protests to all of the tariffs now on file be submitted by Wednesday, June 15, 1977, and that replies to the protests be submitted by Wednesday, June 22, 1977.

In view of the importance of this matter, the Commission has determined that oral argument should be scheduled concerning the question of suspension or investigation of the proposed tariffs. Accordingly, oral argument will be held before the Commission on Monday, June 27, 1977, commencing at 9:30 a.m.

Parties desiring to participate in oral argument shall comply with rule 98 of the Commission's General Rules of Practice (49 CFR 1100.98), by submitting a request for an allotment of time on or before June 17, 1977.

This notice will be served upon each of the eight owning pipeline companies, upon the State of Alaska, upon the United States Department of Justice, and upon the Bureau of Investigation and Enforcement (ICC), and will also be posted in the Office of the Secretary, Interstate Commerce Commission, Washington, D. C., for the information of other interested persons.

H. G. Homme, Jr.,
Acting Secretary.

APPENDIX H

Statement of Donald A. Kaplan, Department of Justice, From Transcript of Oral Argument, Interstate Commerce Commission, Washington, D.C., June 27, 1977
(Transcript Pages 118-121)

• • • • • • • • • •

[119] I hardly imagine that the very powerful interests which hold their debt are going to permit these companies to forego the revenue or going to give them a vacation on their requirement to pay back that debt when tariffs are available which pay off all the expenses, including the debt, and return a generous amount on the equity; nor will the companies or the parent company stockholders permit the line to lie empty.

I can imagine the corporate derivative suits which might occur if they make that decision. But there is another factor, too. If we find on Friday, or next Monday, or whenever, that these carriers—that none of the carriers have decided to file new rates, that they all have, in fact, decided not to [120] operate TAPS, pending the determination of this proceeding, I submit that such a situation would raise serious questions under the Sherman Act.

[121] There is another potential problem——

Commissioner Brown: Would you expound on that just a little bit for me?

Mr. Kaplan: Well, in such failure or unanimous failure by tariff or filed tariffs or not even unanimous, but any failure, with the result of an agreement on the part of these owners not to use the line, in order to coerce the Commission into granting them higher rates or perhaps coerce Congress into—force Congress into perhaps taking jurisdiction away from the Commission, that would be an issue which could raise anti-trust consequences.

Now, of course, this is not an easy question, and one that could not be examined in this oral argument. There are a number of doctrines about dealing with public bodies.

But I submit that there would be questions raised which perhaps should be examined.

• • • • • • • • • •

APPENDIX I

Statement of Peter M. Shannon, Jr., Bureau of Investigations and Enforcement, Interstate Commerce Commission, From Transcript of Oral Argument, Interstate Commerce Commission, Washington, D.C., June 27, 1977 (Transcript Pages 145-147)

• • • • • • • • • •

[145] Mr. Shannon: Mr. Chairman and Members of the Commission, this morning Commissioner Christian asked the attorney for the State of Alaska—I believe two other Commissioners, Commissioners Hardin and Murphy, during the course of oral argument, have alluded to the same type of question—as I understand your question Commissioner Christian, you asked what if the Commission suspends without prejudice to filing rates, lower rates, and what if the oil companies do not file lower rates—what then could the Commission do at that time?

Well, I suggest that there are three avenues of approach that the Commission might want to use, might choose to use. Before describing, very briefly, these three approaches, I'd [146] like to refer the Commission to the fact that four oil companies, Sohio, Exxon, ARCO, and I believe Phillips, are already common carriers, subject to the jurisdiction of this Commission.

I also have been informed that the other Respondents, save BP, have interest in oil pipelines through affiliates. And I know that all the Respondents have voluntarily submitted themselves to the jurisdiction of this Commission by filing the instant tariffs.

With this as a background, I'd like then to refer to Section 14 of the Act. It states as follows, "it shall be the duty of every common carrier, subject to this part, to provide and furnish transportation upon reasonable request therefor.

I submit on behalf of the Bureau of Investigations and Enforcement that because these oil companies are com-

mon carriers, subject to the jurisdiction of this Commission, that they are obliged to transport the oil in question.

And should they, hypothetically, refuse to come before the Commission with lower rates, assuming there is suspension without prejudice, then the Bureau of Investigations and Enforcement would proceed immediately in Federal Court to enjoin them from their failure to perform their duty as common carriers, that is, to transport the oil.

This is the first avenue of approach.

The second avenue would be for the Commission to decide but there are possible approaches.

[147] The Commission has been charged under the preamble to the Act of the National Transportation Policy referred to by the attorney from the Department of Justice—the Commission is charged with the duty to encourage the establishment and maintenance of reasonable charges for transportation services.

And it is my informed opinion that the Commission itself could proceed in the Federal Court and ask for an immediate and permanent injunction against the oil companies for failure to perform their duty as common carriers.

A third approach, which is also for the Commission to decide, is that this Commission, I believe, assuming failure to submit reasonable rates, reasonable tariffs—this Commission itself could order the common carriers to perform their duty to transport the oil under reasonable rates.

And if there is failure on the part of the oil companies to do so, then, again, I believe the Commission could proceed immediately in the Federal Court.

We would provide our services of this Bureau, hopefully with the Department of Justice, alone if necessary, to enforce the Commission's order.

• • • • • • • • • •

STATUTORY APPENDIX

STATUTORY APPENDIX

Interstate Commerce Act

§ 1. Regulation in general; car service; alteration of line

Carriers subject to regulation

(1) The provisions of this chapter shall apply to common carriers engaged in—

• • •

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water—49 U.S.C. § 1(1)(b)(1976) (originally enacted as Interstate Commerce Act of 1887, Ch. 104, pt. I, § 1, 24 Stat. 379, *as amended by* Act of June 29, 1906, Ch. 3591, § 1, 34 Stat. 584; Act of June 18, 1910, Ch. 309, § 7, 36 Stat. 544; Act of Feb. 28, 1920, Ch. 91, § 400, 41 Stat. 474; Act of June 19, 1934, Ch. 652, § 602(b), 48 Stat. 1102; Act of Aug. 9, 1935, Ch. 498, § 1, 49 Stat. 543).

• • •

Definitions.

(3) (a) The term "common carrier" as used in this chapter shall include all pipe-line companies; . . . 49 U.S.C. § 1(3)(a)(1976) (originally enacted as Interstate Commerce Act of 1887, Ch. 104, pt. I, § 1, 24 Stat. 379, *as amended by* Act of June 29, 1906, Ch. 3591, § 1, 34 Stat. 584; Act of June 18, 1910, Ch. 309, § 7, 36 Stat. 544; Act of Feb. 28, 1920, Ch. 91, § 400, 41 Stat. 474; Act of June 19, 1934, Ch. 652, § 602(b), 48 Stat. 1102; Act of Aug. 9, 1935, Ch. 498, § 1, 49 Stat. 543; Act of Sept. 18, 1940, Ch. 722, Tit. I, § 2 (a), (b), 54 Stat. 899).

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Just and reasonable charges; applicability; criteria for determination

(5) (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. The provisions of this subdivision shall not apply to common carriers by railroad subject to this part. 49 U.S.C. § 1(5)(a)(1976) (originally enacted as Interstate Commerce Act of 1887, Ch. 104, pt. I, § 1, 24 Stat. 379, *as amended by* Act of June 29, 1906, Ch. 3591, § 1, 34 Stat. 584; Act of June 18, 1910, Ch. 309, § 7, 36 Stat. 544; Act of Feb. 28, 1920, Ch. 91, § 400, 41 Stat. 474; Act of June 19, 1934, Ch. 652, § 602(b), 48 Stat. 1102; Act of Aug. 9, 1935, Ch. 498, § 1, 49 Stat. 543; Act of Sept. 18, 1940, Ch. 722, Tit. I, § 2(d), 54 Stat. 899; Act of Aug. 2, 1949, Ch. 379, § 1, 63 Stat. 485; Act of Feb. 5, 1976, Pub. L. 94-210, Tit. II, § 202(a), (b), 90 Stat. 34, 35).

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§ 6. Schedules and statements of rates, etc., joint rail and water transportation

Schedule of rates, fares, and charges; filing and posting.

(1) Every common carrier subject to the provisions of this chapter shall file with the Commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. . . . The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter. 49 U.S.C. § 6(1) (1976) (originally enacted as Interstate Commerce Act of 1887, Ch. 104, pt. I, § 6, 24 Stat. 380, *as amended by* Act of Mar. 2, 1889, Ch. 382, § 1,

25 Stat. 855; Act of June 29, 1906, Ch. 3591, § 2, 34 Stat. 586; Act of Feb. 28, 1920, Ch. 91, § 409, 41 Stat. 483; Act of Aug. 9, 1935, Ch. 498, § 1, 49 Stat. 543).

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Change in rates, fares, etc.; notice required; simplification of schedules.

(3) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, . . . 49 U.S.C. § 6(3) (1976) (originally enacted as Interstate Commerce Act of 1887, Ch. 104, pt. I, § 6, 24 Stat. 380, *as amended by* Act of Mar. 2, 1889, Ch. 382, § 1, 25 Stat. 855; Act of June 29, 1906, Ch. 3591, § 2, 34 Stat. 586; Act of Feb. 28, 1920, Ch. 91, §§ 409, 410, 41 Stat. 483).

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Transportation without filing and publishing rates forbidden; rebates; privileges.

(7) No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; . . . 49 U.S.C. § 6(7) (1976) (originally enacted as Interstate Com-

merce Act of 1887, Ch. 104, pt. I, § 6, 24 Stat. 380, *as amended by* Act of Mar. 2, 1889, Ch. 382, § 1, 25 Stat. 855; Act of June 29, 1906, Ch. 3591, § 2, 34 Stat. 586; Act of Feb. 28, 1920, Ch. 91, § 411, 41 Stat. 483; Act of Aug. 9, 1935, Ch. 498, § 1, 49 Stat. 543).

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§ 8. Liability in damages to persons injured by violation of law

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. 49 U.S.C. § 8 (1976) (originally enacted as Interstate Commerce Act of 1887, Ch. 104, pt. I, § 8, 24 Stat. 332; *as amended by* Act of Aug. 9, 1935, Ch. 498, § 1, 49 Stat. 543).

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§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

Commission empowered to determine and prescribe rates, classifications, etc.

(1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever

demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed. 49 U.S.C. § 15(1) (1976) (originally enacted as Interstate Commerce Act of 1887, Ch. 104, pt. I, § 15, 24 Stat. 384, *as amended by* Act of June 29, 1906, Ch. 3591, § 4, 34 Stat. 589; Act of June 18, 1910, Ch. 309, § 12, 36 Stat. 551; Act of Feb. 28, 1920, Ch. 91, § 418, 41 Stat. 484; Act of June 19, 1934, Ch. 652, § 602(b), 48 Stat. 1102; Act of Aug. 9, 1935, Ch. 498, § 1, 49 Stat. 543; Act of Sept. 18, 1940, Ch. 722, Tit. I, § 10(a), 54 Stat. 911).

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Commission to determine lawfulness of new rates; suspension; refunds; nonapplicability to common carriers by railroad subject to chapter.

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing

and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as posible. This paragraph shall not apply to common carriers by railroad subject to this chapter. 49 U.S.C. § 15(7) (1976) (originally enacted as Mann-Elkins Act of 1910, Ch. 309, § 12, 36 Stat. 551, *amending* Act of Feb. 4, 1887, Ch. 104, pt. I, § 15, 24 Stat. 384, *and as amended by* Act of Feb. 28, 1920, Ch. 91, § 418, 41 Stat. 484; Act of Mar. 4, 1927, Ch. 510, § 2, 44 Stat. 1447; Act of Sept. 18, 1940, Ch. 722, Tit. I, § 10(c), 54 Stat. 912; Act of Feb. 5, 1976, Pub. L. No. 94-210, Tit. II, § 202(e)(1), 90 Stat. 36).

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Trans-Alaska Pipeline Authorization Act

§ 1. Congressional findings and declaration

The Congress finds and declares that:

(a) The early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources.

(b) The Department of the Interior and other Federal agencies, have, over a long period of time, conducted extensive studies of the technical aspects and of the environmental, social, and economic impacts of the proposed trans-Alaska oil pipeline, including consideration of a trans-Canada pipeline.

(c) The earliest possible construction of a trans-Alaska oil pipeline from the North Slope of Alaska to Port Valdez in that State will make the extensive proven and potential reserves of low-sulfur oil available for domestic use and will best serve the national interest.

(d) A supplemental pipeline to connect the North Slope with a trans-Canada pipeline may be needed later and it should be studied now, but it should not be regarded as an alternative for a trans-Alaska pipeline that does not traverse a foreign country. 43 U.S.C. § 1651 (1976) (Act of Nov. 16, 1973, Pub. L. 93-153, Tit. II, § 202, 87 Stat. 584).

§ 2. Authorizations for construction—Congressional declaration of purpose

(a) The purpose of this chapter is to insure that, because of the extensive governmental studies already made of this project and the national interest in early delivery of North Slope oil to domestic markets, the trans-Alaska oil pipeline be constructed promptly without further ad-

ministrative or judicial delay or impediment. To accomplish this purpose it is the intent of the Congress to exercise its constitutional powers to the fullest extent in the authorizations and directions herein made and in limiting judicial review of the actions taken pursuant thereto. 43 U.S.C. § 1652(a) (1976) (Act of Nov. 16, 1973, Pub. L. 93-153, Tit. II, § 203, 87 Stat. 584).

CERTIFICATE OF SERVICE

I hereby certify that on this 22d day of September, 1977, three copies of the annexed Petition for Writ of Certiorari were served by hand upon all counsel of record below and the Solicitor General of the United States.

/s/ ANDREW J. KILCARR
1666 K Street, N.W.
Washington, D.C. 20006

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